No. 428

In The

Supreme Court of the United States

October Term, 1965

R. C. Wetherall, Jr. and Paul Price

Appellants

v.

The State Road Commission of West Virginia, a Corporation, and Burl A. Sawyers, as State Road Commissioner,

Appellees

On Appeal from the Circuit Court of Kanawha County, West Virginia

JURISDICTIONAL STATEMENT

Carney M. Layne
638 Fifth Avenue
Huntington, West Virginia

Charles W. Yeager
606 Kanawha Valley Building
Charleston, West Virginia

James W. St. Clair
623 Seventh Street
Huntington, West Virginia
Attorneys for Appellants

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No. ——

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Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on May 21, 1964, dismissing appellants' complaint and cross-claim on the ground it constituted a suit against the State of West Virginia. On petition timely filed the Supreme Court of Appeals of West Virginia, by order dated March 15, 1965, refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning has expired. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

This appeal presents another and complementary aspect of the denial of due process in the handling of State Road Commission highway construction contracts as contained in

Appeal No. 144, October Term, 1965, now pending in this Court and styled Howard Price d/b/a Howard Price and Company v. The State Road Commission of West Virginia, a corporation, et als. Both cases involve the taking by the State of a contractor's work and material as incorporated in public projects and denying him a day in court to establish and enforce his rights.

OPINION BELOW

The letter opinion of the Circuit Court of Kanawha County, West Virginia, dated April 13, 1964, is not reported. Copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Appellant R. C. Wetherall, Jr. filed his declaratory judgment complaint in the Circuit Court of Kanawha County on September 24, 1963, pursuant to Chapter 26, Acts of the West Virginia Legislature, Regular Session 1941, page 132, (Appendix B) being Chapter 55, Article 12, Code of West Virginia, 1931, as amended, and Rule 57 of the West Virginia Rules of Civil Procedure, 144 W. Va. Reports, page xxviii, (Appendix C). The complaint sought a declaratory judgment as to the rights of Appellant R. C. Wetherall, Jr. and of the Appellant Paul Price under a highway construction contract entered into by Appellant Paul Price with the State Road Commission of West Virginia, asking: (1) That a certain provision of the contract be interpreted and the rights of the parties declared; and sequentially (2) that after such interpretation and declaration of rights, the Road Commission be compelled to perform his statutory duty to audit Appellants' claim for work performed in constructing a small dam.

On May 21, 1964, the trial Court entered its final judgment order sustaining Appellees' motion to dismiss Appellants' complaint and cross-claim as a suit against the State. This is the judgment upon which review is sought (Appendix D).

Appellants thereupon filed their petition for appeal to the Supreme Court of West Virginia on January 6, 1965. On March 15, 1965 the Supreme Court of Appeals of West Virginia entered its order refusing to review the case (Appendix J). The time for re-petitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County, West Virginia, on June 11, 1965.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by title 28, United States Code, Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment of the Federal Constitution on the facts of the case, is within the purview of that section. *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall 661; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U.S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginian R. Co.* v. *Mullens*, 271 U.S. 220.

The cause presents a justiciable controversy and meets the conditions which establish the validity of the declaratory procedure as set forth in *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249 and *Evers* v. *Dwyer*, 358 U.S. 202.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Roberts* v. *Cottingham*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P.*

Tel. Co., 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISION INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted to voters; Ratified 1936. (The amendment added an exception pertaining to garnishment):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES.—The State Road Commission of West Virginia, heretofore cre-

ated and *existing as a corporation*, shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1445 (1)), p. 866.) (Italics supplied.)

• • • •

2. The following statutes are also pertinent as pertaining to the Road Commissioner's duty to audit contractor's claims and issue requisitions for their payment; the statutory direction that road construction shall be performed under contract awarded by bid, giving detailed statutory requirements; and the statutory authority for the State Conservation Commission to undertake the construction of slack water dams through the office and facilities of the State Road Commission.

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Section 4

Article 4, Sections 19, 20 and 21

Chapter 20, Code of West Virginia, 1931, as amended:

Article 5, Part II, Sections 6, 7, 8, 9, 10

(See Appendix E for pertinent parts of above sections, and official reference to amending Acts of the Legislature).

QUESTIONS PRESENTED

Appellants R. C. Wetherall and Paul Price, by a declaratory judgment complaint and cross-claim respectively, against the Road Commission and the Road Commissioner, asked for an interpretation of a highway and dam construc-

tion contract between Appellant Paul Price and the Road Commission.

The contract with the Road Commission included the construction of a slack water dam for the State Conservation Commission which was to pay the cost of same. The dam work was to be, and was, paid for during the progress of the dam work in the monthly estimates. When the dam work was completed and accepted, the Road Commissioner arbitrarily ignored the terms of the contract and deducted the payments already made for the dam work from the payment still acknowledgedly due on road construction. The Road Commission had already collected from the State Conservation Commission the payment for the dam work which it withholds from Appellant Paul Price. There is no dispute of fact as to the work involved. The dispute is solely one of law upon the interpretation of the contract. As permitted by the West Virginia Rules of Civil Procedure, the complaint and cross-claim asks that after the rights were declared, that Appellants be granted coercive relief compelling the Road Commissioner to perform his statutory duty to audit the claim, certify the dam work, and issue a requisition for its payment. On motion to dismiss the Court declined to interpret the contract on the ground the proceeding was against the State of West Virginia and prohibited by Section 35, Article VI of the State Constitution. The questions presented are:

1. Were the actions of the Road Commissioner, as alleged, and the action of the trial Court in applying the immunity provision of the State Constitution, refusing to interpret the contract and dismissing the proceeding, repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

(1) Constitute a denial of due process of law by the State?

(2) Constitute the taking by the State of private property for public use without just compensation?

(3) Constitute a denial by the State of the equal protection of the law?

2. Does the application by the State Court to Appellants' complaint and cross-claim, of said Section 35, Article VI of the Constitution of West Virginia, on the Appellees' motion to dismiss, and without a hearing on the merits or an interpretation of the contract, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Appellees filed a motion to dismiss the complaint on the ground that the proceeding was a suit against the State of West Virginia and prohibited by the immunity provision of the State Constitution. By stipulation it was agreed the motion would likewise apply to the cross-claim. It was at this initial stage that the Federal questions were raised.

The West Virginia Rules of Civil Procedure allow no responsive pleadings to a motion to dismiss, and the Federal questions were raised in argument on the motion to dismiss. Appellants argued that the application to this case of the state constitutional provision on immunity, for the work material and services already performed by Appellants and incorporated into the public dam on the public recreational area, and for which, on a legal and proper interpretation of the contract, the Road Commissioner had no right or authority to refuse to certify, and for which he had a statutory duty to audit and issue a requisition for payment, would deny Appellants the due process and equal protection of law, and allow their property to be taken by the Road Commission for public use without any compensation to them.

The trial court issued its opinion on the motion by letter dated April 13, 1964, and on May 21, 1964, entered the final judgment order (Appendix D), sustaining Appellees' mo-

tion, dismissing the entire proceeding on the ground that it was an action against the State of West Virginia.

The Appellants objections to the Court's rulings and their reasons therefor were noted in the final order itself. The reasons embracing Federal grounds read as follows:

* * *

"7. The Court's ruling denies plaintiff and defendant and cross-claimant Paul Price, the rights guaranteed to them under Section 10, Article I of the Constitution of the United States, and under Section 1, Article XIV of the Amendments to the Constitution of the United States."

* * *

Appellants further raised the federal questions in their Assignment of Errors (Record, p. 28) contained in their petition for appeal to the Supreme Court of West Virginia, the pertinent parts of which read as follows:

* * *

"16. The dismissal of the action denies the plaintiff Wetherall and cross-claimant Price the right of due process guaranteed to them under both the State and Federal constitutions.

17. The dismissal of the action denies plaintiff Wetherall and cross-claimant Price the right to receive just compensation for property taken for public use as guaranteed under both the State and Federal Constitutions."

* * *

The objections and the assignment of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia respectively.

An amplified restatement of these federal questions appears in the order certifying the existence of federal questions and entered by the trial Court on June 1, 1965, (Appendix F) the pertinent parts of which read as follows:

"• • • and it hereby is certified and by this order made a part of the record of this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the plaintiff and on behalf of the cross-claimant, upon the motion to dismiss by the defendants, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, State Road Commissioner, it was insisted and relied upon by said plaintiff and by said cross-claimant, that the application of Section 35, Article VI of the Constitution of West Virginia, to this case would deprive plaintiff and cross-claimant of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution; and the question was not determined favorably to the plaintiff and to the cross claimant as appears from the entry and final order of dismissal made herein, to all of which counsel for the defendant objects and excepts upon the ground that said issues were not shown upon the record. • • •"

STATEMENT OF THE CASE

Appellants R. C. Wetherall's and Paul Price's complaint and cross claim respectively are attached as Appendix G and H. In essence the complaint and cross-claim allege as follows. Appellant Paul Price entered into a highway construction contract with the Road Commission for the construction of a Federal Aid secondary road project. The contract included highway construction for the State Road Commission itself on its right-of-way, and the construction of a slack water dam on an adjoining recreational area owned by the State Conservation Commission, which pursuant to statute (Appendix E) it undertook through the office and facilities of the Road Commission (Appendix G, p. 23a). The roadway work and the dam work each had separate specifications (Appendix G, p. 22a). There is set

forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof (Appendix G, p. 22a).

There is set forth pertinent contract provisions that the Appellant Paul Price was to be paid by monthly estimate the unit bid price for the actual quantities necessary to complete the work (Appendix G, p. 23a). The pertinent item of work involved in the action is Item 3 "Borrow Pit Excavation" under the dam portion of the work (Appendix G, p. 24a). The bid proposal, plans and special provisions ("Technical Specifications, Castleman Run Lake No. 1"), all being part of the contract documents, provided that the material required under "Borrow Pit Excavation" to be used in the dam construction *was to be taken and selected from the material removed in the roadway excavation, and the cost of selecting, segregating, hauling, placing and compacting said materials, according to the technical specifications of the Conservation Commission,* (in short, the building of the dam), *was required to be included in the unit bid price for Item 3, "Borrow Pit Excavation," and to be paid for under such item* (Appendix G, pp. 24a, 25a; Appendix I, p.p. 32a, 33a).

Appellant R. C. Wetherall had an employment contract with Appellant Paul Price to perform the actual work on the project for 90% of the unit bid price, less the costs thereof and he was to be paid for the same items and quantities of work for which Appellant Paul Price was to receive payment from the State Road Commission (Appendix G, p. 25a). The work was performed and has been approved and accepted by the State Road Commission (Appendix G, p. 25a). Appellants used 41,695.5 cubic yards of material in the dam, which was designated Item 3, "Borrow Pit Excavation," at a unit bid price of 50 cents a cubic yard. During the progress of the work the Road Commission paid Appellants monthly estimates for the estimated quantities

of borrow excavation used in the dam (Appendix G, pp. 25a, 26a), Upon the completion of the work the Road Commissioner calculated the final estimate of quantities and allowed for payment the 41,695.5 cubic yards of "Borrow Pit Excavation." (Appendix G, p. 26a). Subsequently, the Road Commissioner on his own accord arbitrarily eliminated from the final estimate, payment of the $20,847.75 for the 41,695.5 yards of "Borrow Pit Excavation" representing the payment for building the dam (Appendix G, p. 26a). He then deducted the amounts previously paid for "Borrow Pit Excavation" on the dam work, from the amounts still acknowledgedly due Appellants on items of road work. (Appendix G, p. 26a). The stated reason for the Road Commission's action was the *supposed ground that under the Standard Specifications borrow material cannot come from a right-of-way* (Appendix G, p. 27a; Appendix I, p. 33a, 34a). *notwithstanding the express directions and provisions of the bid instructions, bid proposal and special provisions to the contrary,* all of which *governed and took precedence* over the *Standard Specifications* by an express provision of the *Standard Specifications* themselves (Appendix G, p. 24a; Appendix I, p. 34a, 35a.) (See all of Appendix I for pertinent contract provisions verbatim) (We note the trial Court was under the erroneous impression that when the Commissioner increased the item of Unclassified Excavation, he was re-classifying the Borrow Excavation as such (Appendix A, p. 2a), when in fact the increase of Unclassified Excavation was due to slide removals, etc., which had nothing to do with the dam or Borrow Excavation).

Appellant Paul Price refused to institute this proceeding stating he had only a 10% interest therein and did not want to *"antagonize"* the Road Commission (Appendix G, p. 26a). Appellant R. C. Wetherall filed the action and made Appellant Paul Price a defendant, who filed a cross-claim against the Road Commission and Road Commissioner.

There is no factual dispute, but only a dispute of law as

to the terms of the contract and the Road Commission's obligation to pay for the construction of the dam as represented under the Item 3, designated "Borrow Pit Excavation," (Appendix G, p. 27a). and now appropriated by the State as incorporated in one of its public recreational facilities, *and which if not allowed, the Appellants will receive nothing for building the dam.*

Not known to the Appellants until after the time of the entry of the final order, *the Road Commission had already requisitioned and had transferred to it by the Conservation Commission the sum of $52,200, which included the amount for building the dam under the item "Borrow Pit Excavation" which was to be paid to Appellant Paul Price.* This fact was noted in the petition for appeal to the Supreme Court of Appeals of West Virginia and photocopies of the paid requisitions attached thereto (Record, pp. 31, 32).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented on this appeal involve the underlying question whether or not the immunity of the State under West Virginia's peculiar constitutional provision is available as a defense to the Road Commission and the Road Commissioner under the particular allegations of Appellants' complaint and the relief sought therein. Numbered paragraphs 2, 3, 4, 7 and 8 herein are substantially the same as the similarly numbered paragraphs contained in this section of the Jurisdictional Statement filed in Appeal No. 144, October, 1965 term (Howard Price dba etc., 1. State Road Commission et als) and now pending before this Court.

1. The importance of this question is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commission through the Road Commissioner, who undertakes it

through contracts with private concerns. The Road Commissioner by law is vested with extensive powers, and with the expanding highway program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. *If the Road Commissioner, under the facts of this case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are obvious and far-reaching.*

The Trial Court's decision would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being. *It allows the State's immunity to become an instrument of favoritism, a tool of oppression, a cloak for incompetence on matters supposedly dignified by the sanctity of contractual obligation.*

2. These questions are equally important to the citizens of this State who by constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly it is important to the Federal Government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* Part of the cost of the project here involved was paid for by the Federal Government. In the fiscal year 1961-62 the Road Commissioner spent approximately 30% of all funds spent by the State of West Virginia (Official West Virginia Blue Book, 1963, p. 953).

If the Road Commission and Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors so that the contractors are unable to secure an impartial adjudica-

tion of their rights under their contracts, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis this poses a wasteful drain upon funds provided for the purpose by both the State and Federal governments.

3. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both state action within the meaning of the Fourteenth Amendment (*Shelley* v. *Kraemer*, *McGhee* v. *Sipes*, 334 U.S. 1). Appellants' work, material and services already performed and incorporated into the public dam on the public recreational area adjoining the highway, and their rights under the contract are "property" with the protection of the due process and equal protection of law provision of the Fourteenth Amendment (*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the states by the privileges and immunities clause of the Fourteenth Amendment (*West* v. *C & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

4. This is a suit against the State Road Commissioner for wrongfully exceeding his authority, under color of office, and for failing to perform a statutory duty. The contract being with the Road Commission it was a necessary party to a declaration of the rights thereunder. The mere declaration of such rights does not constitute a suit against the State. *Once these rights are judicially determined by an interpretation of the contract, it will be shown that the Road Commissioner failed to perform his statutory duty.* Under the prayer for coercive relief, as permitted in West

Virginia declaratory judgment procedure to be joined with the prayer for declaratory relief, the complaint sequentially asks that the Road Commissioner be compelled to perform his statutory duty. In this respect the holding of the lower court is in conflict with the decisions of this Court in *Rolston* v. *Crittenden*, 120 U.S. 390, *Payne* v. *Central P. R. Co.*, 255 U.S. 228, *Ickes* v. *Fox*, 300 U.S. 82, *Board of Liquidation* v. *McComb*, 92 U.S. 531, and *Noble* v. *Union River Logging Company*, 147 U.S. 165, and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

5. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320 decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission to be sued was unconstitutional as violating the prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was absolute and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957 the Legislature nevertheless did not delete the consent to be sued, but on its reenactment reaffirmed its position that the Road Commission could sue and be sued, and thereby provided a legislative recognition of the requirements of due process.

The trial Court took the position that by virtue of the decisions of the State Supreme Court, the action as a declaratory judgment proceeding was per se an action against the State. By taking such position the trial Court *avoided making an interpretation of the contract which was solely a matter of law.* It undertook then to consider it as a mandamus and held that the cause was a *"claim involving a legitimate dispute as to the interpretation and application" of the contract*, and that the Road Commissioner's construction was not *"arbitrary or unreasonable"*, a holding which *necessarily postulates that the interpretation of the contract*

was within the discretion of the Road Commissioner, and in effect destroys the sanctity of the Commission's contractual obligation. The trial Court's ruling in this respect, without interpreting the contract on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is i nconflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196, and *Tindal* v. *Wesley*, 167 U.S. 204. Only after the preliminary question as to the rights of the parties under the contract had been decided, and the same decided against the Appellants can there come into play any claim of sovereign immunity. We note that in Appeal No. 144, October Term 1965 (Howard Price dba etc. v. State Road Commission et als) the trial Court in applying the constitutional provision dismissed the action because it involved *a controversy of fact;* in the case herewith it dismissed it when the sole matter involved was a *question of law.*

6. Inherent in the opinion of the lower Court was the thought that the proceeding was against the State in view of the fact that to compel the Road Commissioner to perform his statutory duties would set in motion a sequence of events which would ultimately result in the payment of money. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The money for the payment of the dam construction was expressly appropriated by the State Legislature for such purpose. It had been separated and segregated from the general revenues, and actually transferred by the State Conservation Commission to the State Road Commission for payment to the Appellants for the dam construction. *The statutes expressly gives to the Road Commission the legislative authority to enter into construction contracts, and as part of that authority attached the condition it may be sued.* The statute also makes it mandatory for the Road Commissioner to audit the contractor's claims and issue his requisition for the payment of those found correct.

7. The Federal Government by furnishing participating funds for certain projects, the contracts for the construction of which are handled by the Road Commission, has utilized the Road Commission as its agent in the exercise of its constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

8. The State Supreme Court by its prior decisions holding the Legislature can never consent to a suit, imposed a stringency in excess of the common law doctrine of immunity. Under such holdings it is impossible to give consent, although in fact the Legislature has consented to suits against the Road Commission. Whether such absolute immunity, in the light of the Legislature's granting such consent, is valid, regardless of whether the proceedings concern property taken for public use without compensation, is a question never passed on by this Court.

9. On motion to dismiss, the allegations of Appellants' Complaint and cross-claim must be assumed to be true. The facts alleged are that the Road Commissioner, by refusing to certify Appellants' work in constructing the dam, has appropriated $20,847.75 of Appellants' property as incorporated in the public dam in a public recreational area without compensation to Appellants, and for which the Road Commissioner has collected the payment therefor from the State Conservation Commission, and kept to the use of the Road Commission contrary to the purpose for which it was appropriated by the State Legislature. *Appellant has been deprived of his property for public use, denied his compensation therefor, and refused the opportunity to establish his rights by a simple question of law on the interpretation of the contract. Appellant has not had his day in Court, he has not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, effecting both the State and Federal highway construction program, the highway construction industry and the board spectrum of governmental morality. They involve the accountability of state officials and the delicate balance between the prerogative of governmental authority and the constitutional rights of the individual. Appellant submits that the precedents established by this Court do not support the decision of the Circuit Court of Kanawha County but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

August 3, 1965

Respectfully submitted,

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia

APPENDIX A

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

April 13, 1964

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

James W. St. Clair, Esq.
Attorney at Law
523 Seventh Street
Huntington, West Virginia

Anthony G. Halkias, Esq.
Legal Division
State Road Commission
1800 Washington Street, E.
Charleston, West Virginia

Gentlemen:

Re *R. C. Wetherall, Jr.* v. *State Road Commission, et al*

This cause now comes on upon the motions of the defendants, The State Road Commission of West Virginia, and Burl A. Sawyers, State Road Commissioner, to dismiss the complaint of the plaintiff, R. C. Wetherall, Jr., and the cross-claim asserted against the State Road Commission by the defendant Paul Price.

The complaint declares that "This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, * * *." The anomalous relief prayed for by the plaintiff is that this Court "* * * declare the right of Paul

Price to be paid by the Road Commission * * *" certain specified sums of money. In addition, coercive relief is sought by the plaintiff.

The source of this action is the construction contract awarded to Paul Price by the State Road Commission, dated October 28, 1960, for the construction of a roadway, dam and causeway, known as the Castleman Run Road Project. The plaintiff's involvement arises out of an employment agreement between the plaintiff and Paul Price dated November 29, 1960, whereby the plaintiff agreed to perform the actual work involved in the project for a specified percentage of the unit bid prices paid by the Road Commission. Privity of contract is not alleged to exist between the plaintiff and the Road Commission.

Upon completion of the construction work, the State Road Commissioner calculated the total estimate of quantities of work performed and classified the excavation into the various categories for the purpose of awarding the proper compensation to Paul Price. In response to a protest by Paul Price, 41,695.5 cubic yards of excavation, which had been designated "borrow pit excavation" at a unit bid price of fifty cents per cubic yard, was re-classified by the Commissioner as "unclassified excavation", having a unit bid price of sixty cents per cubic yard. Paragraph eleven of the complaint states:

> "That no dispute exists between any of the parties hereto as to the work performed on the items designated as unclassified excavation and borrow, nor any dispute as to the quantities of said work, but only a dispute as to whether under the terms of the contract the Road Commission is obligated to pay for the borrow."

In other words, the issue presented is whether or not, under the terms of the construction contract, the contractor is entitled to compensation at the rate of fifty cents per cubic yard for excavating 41,695.5 cubic yards from the

roadway, and an additional sixty cents per cubic yard for placing the same 41,695.5 cubic yards of excavation in the causeway embankment.

However, it is manifest, even before resorting to a consideration of the terms of the construction contract, that the motion to dismiss the plaintiff's complaint must be sustained. It is apparent from the allegations of the complaint that the plaintiff does not allege a cause of action against the Road Commission, because, as heretofore noted, the only alleged relationship between the plaintiff and the Road Commission was the employment agreement between the plaintiff and Price whereby the plaintiff agreed to perform the actual work on the project for a percentage of the compensation. The allegation to the effect that the plaintiff will ultimately derive the greatest benefit in the event of recovery from the Road Commission, is not a sufficient interest to make the plaintiff the real party in interest. *39 Am. Jur., Parties,* §17, page 871, et seq.

It is declared in the complaint, and argued in plaintiff's brief, that Rule 17(a), R.C.P. gives the plaintiff the right to institute this proceeding against the Road Commission. It is, however, my interpretation that the "real party in interest" provision of Rule 17 was not intended to give a person who is a stranger to a contract, authority to assert the rights of one of the parties merely because the stranger may ultimately derive what is alleged to be the greatest benefit therefrom, as is the case here. "Most authorities agree that the 'real party in interest' is the party who, by the substantive law, possessed the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *3 Federal Practice and Procedure, Barron and Holtzoff,* §482, page 7, et seq. I am therefore of opinion to sustain the motion to dismiss the complaint of the plaintiff R. C. Wetherall, Jr.

The cross-claim of the defendant, Paul Price, affirms and adopts all of the allegations of the plaintiff's complaint with

the exception of paragraph ten. The cross-claim does not declare the theory upon which the claim is based, but the relief prayed for is for this Court to declare his right to be paid certain sums of money by the State for the work involved in the construction project, and that the Road Commissioner be compelled to issue a requisition upon the State Auditor for payment for such work. As alleged in paragraph one, this claim is predicated upon the authority of Code, 17-3-4, which provides in part:

> "Any claim of a contractor or others, not otherwise provided for, for labor done or for materials and supplies furnished *to the state road commission*, pursuant to the provisions of any article of this chapter, shall be audited by the commission, and, if found to be correct, the commission shall issue its requisition upon the auditor of the State therefor, showing the nature of such claim and whether it is for labor done or materials and supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose." (Emphasis supplied.)

It must be kept in mind that the uniqueness of the remedy employed in seeking to enforce the relief provided for in the above statute, without commenting on the propriety thereof, does not serve to elude the stringent prerequisites heretofore prescribed to the award of a writ of mandamus. In *State v. Road Commission*, 108 W.Va. 41, the relators sought mandamus to compel the State Road Commission to execute a requisition upon the State Auditor for work performed in the construction of a roadway. In order to comply with certain technical specifications in the contract, it became necessary for the relators to excavate beneath the designated crown of the road being constructed, and "back fill" with material suitable for the purpose. There were no provisions in the contract entitling the relators to com-

pensation for the additional work. The assistant division engineer recommended to the Commission that the relators should be paid for the additional work, but the Commission refused to issue a requisition upon the State Auditor. The Court, in refusing the writ, held that the additional work performed was actually incident to the work for which the estimates were made and compensation paid by the State Road Commission. The Court then went on to say:

> "'Since the purpose of a writ of mandamus is not to establish a legal right but to enforce one which has already been established, the legal right of plaintiff or realtor to the performance of the particular act of which performance is sought must be clear and complete.' 38 C.J.S. 582. A doubtful or substantially disputed right will not be enforced by mandamus. Idem, page 585. The writ is never issued in a doubtful case. 'Clear legal right of the relator in mandamus to have performance of the act he seeks to coerce performance of, and plain duty to perform it, on the part of the respondent, are essential to the award of the writ.' Smith v. County Court, 78 W.Va. 168. Under these well settled principles the writ could in no event be awarded in the instant case. The most liberal concessions to the relators would involve a question of doubt."

Judge Maxwell, commenting on the decision in *Draper* v. *Anderson*, 102 W.Va. 633, awarding mandamus, made the following observations:

> "Clearly, the 'labor performed by them * * * under a contract' there referred to, is labor for which the contractors are to be paid under the terms of the contract, —not labor as to which there may be a legal question as to whether the contract contemplates compensation to the contractors. The *Draper* case only went to the extent of holding, as declared in syllabus one, that 'The performance by public officials of a plain legal duty, not involving the exercise of discretion or judgment on their part, may be enforced by writ of mandamus.' The

converse is necessarily true. Where there is not a plain statutory duty to be performed mandamus will not lie."

The fundamental rule that one who seeks to enforce mandamus must show clear legal right to the remedy, and the plain duty of the respondent to perform the act, has consistently been resounded and applied in numerous decisions by the Supreme Court of Appeals of this State. *Hutton* v. *Holt*, 52 W. Va. 672; *Marcum* v. *Ballot Commissioners*, 42 W. Va. 263; *State ex rel. Smith* v. *County Court*, 78 W. Va. 168; *Koebert* v. *Clarksburg*, 114 W. Va. 406; and *State ex rel. Fox* v. *Board of Trustees*, The Syllabus Service, Supreme Court of Appeals of West Virginia, March 17, 1964.

It is apparent from the allegations of the cross-claim and exhibits attached thereto (Contractor's Proposal, Contract, Standard Specifications and Technical Specifications) not only that this cause is, at best, a claim involving a legitimate dispute as to the interpretation and application of various provisions of the Contract and Specifications relative to the work done, but that the position taken by the defendants, in construing and applying the contract, is not arbitrary or unreasonable. The cross-claimant having failed to demonstrate his clear legal right, and the plain duty of the defendants, it therefore appearing to a certainty that the cross-claimant is not entitled to relief under Code, 17-3-4 under any state or facts which could be proved in support of the cross-claim, I am of opinion to sustain the motion of the defendants, The State Road Commission and Burl A. Sawyers, State Road Commissioner, to dismiss the cross-claim.

A proper order in conformity herewith should be tendered for entry promptly, and should make this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FLT:R

FRANK L. TAYLOR, *Judge*

APPENDIX B

Chapter 26, Acts of the West Virginia Legislature, Regular Session, 1941, p. 132, entitled "Uniform Declaratory Judgments Act", being Chapter 55, Article 13 of the Code of West Virginia, 1931, as Amended; Same, Michie's Code of 1961 (Serial Sections 5516(1) to (16) p. 1131)

Section 1. POWERS OF COURTS TO DECLARE RIGHTS, STATUS AND OTHER LEGAL RELATIONS. —Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 2. WHO MAY HAVE DETERMINATION AND OBTAIN DECLARATION.—Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 3. CONSTRUCTION OF CONTRACT BEFORE OR AFTER BREACH.—A contract may be construed either before or after there has been a breach thereof.

Section 4. DECLARATION CONCERNING TRUSTS AND ESTATES.

* * *

Section 5. ENUMERATION NOT RESTRICTION.—The enumeration in sections two, three, and four does not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory

relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Section 6. WHEN COURT MAY REFUSE JUDGMENT OR DECREE. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Section 7. REVIEW OF ORDERS, JUDGMENTS AND DECREES.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees.

Section 8. FURTHER RELIEF ON PETITION; SHOWING BY ADVERSE PARTY.—*Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.* The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith (Italics supplied).

Section 9. ISSUES OF FACT; TRIAL AND DETERMINATION.—*When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.* (Italics supplied).

Section 10. AWARD OF COSTS.

* * *

Section 11. PARTIES TO ACTION; MUNICIPAL ORDINANCE OR FRANCHISE INVOLVED.

* * *

Section 12. ARTICLE REMEDIAL; LIBERAL CONSTRUCTION AND ADMINISTRATION. This article is

declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Section 13. "PERSON" DEFINED.

* * *

Section 14. PROVISIONS SEVERABLE; EXCEPTIONS.

* * *

Section 15. INTERPRETATION AND CONSTRUCTION.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Section 16. CITATION OF ARTICLE.—This article may be cited as the "Uniform Declaratory Judgments Act."

APPENDIX C

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD

Adopted and promulgated by order of the Supreme Court of Appeals of West Virginia entered October 13, 1959, effective on and after July 1, 1960, and as contained in 144 W. Va. Reports, p. xcviii.

• • •

RULE 57
DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgment Act, Code, Chapter 55, Article 13, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. *The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action* or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (Italics supplied).

• • •

APPENDIX D

R. C. Wetherall, Jr.,

v.

Civil Action No. 3921

The State Road Commission of West Virginia, a corporation, Burl A. Sawyers, as State Road Commissioner, and Paul Price,

On a day heretofore, this action came on to be heard upon:

(a) Plaintiff's complaint and exhibits thereto;

(b) The motion to dismiss the action and complaint on behalf of the defendants, The State Road Commission and Burl A. Sawyers as State Road Commissioner, on the ground the complaint fails to state a cause of action against them over which the Court has jurisdiction;

(c) The answer of the defendant Paul Price;

(d) The amended answer of the defendant Paul Price and his cross-claim against the defendants The State Road Commission and Burl A. Sawyers as State Road Commissioner;

(e) The stipulation that the motion to dismiss the action and complaint on behalf of the defendants, The State Road Commission and Burl A. Sawyers as State Road Commissioner, shall also be taken and treated as a motion to dismiss the cross-claim of the defendant and cross-claimant Paul Price;

and upon all the orders filed herein and upon the briefs and argument of counsel.

Whereupon the Court took time to consider its decision and after deliberation is of the opinion to, and doth hereby, SUSTAIN the motion of the defendants The State Road

Commission and Burl A. Sawyers as State Road Commissioner, (1) to dismiss plaintiff's complaint on the ground the plaintiff does not allege a cause of action against the defendants the State Road Commission and Burl A. Sawyers as State Road Commissioner; and (2) to dismiss the cross-claim of the defendant and cross-claimant Paul Price on the ground that cross-claimant has failed to demonstrate a clear legal right and is not entitled to relief under Chapter 17, Article 3, Section 4 of the Official Code of West Virginia, 1931, as amended, all for the reasons expressed in a letter memorandum of opinion of the Court dated April 13, 1964, which letter memorandum of opinion is ORDERED to be, and is hereby, filed herein as a part of this order and made a part of the record of this cause.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. Plaintiff's complaint be, and it is hereby, dismissed with prejudice; and

2. The cross-claim of the defendant and cross-claimant Paul Price be, and it is hereby, dismissed with prejudice.

3. The defendants, The State Road Commission and Burl A. Sawyers as State Road Commissioner, be, and they are hereby, awarded judgment against the plaintiff and the cross claimant, Paul Price, for their costs in their own behalf expended and a statutory attorney fee of ten dollars.

To all of which action of the Court the plaintiff R. C. Wetherall, Jr., and the defendant and cross-claimant Paul Price, do object and except for the following reasons:

1. The complaint and exhibits show that R. C. Wetherall, Jr. is the real party of interest, that Paul Price had refused to prosecute the claim and had been made a party defendant herein pursuant to Rule 19(a) of the Rules of Civil Procedure; and that R. C. Wetherall, Jr. is accordingly a proper party plaintiff.

2. The interpretation of the contract by the Court on a motion attacking jurisdiction, is premature.

3. *The interpretation of the contract is a matter of law and not subject to the discretion of the defendants,* and the test of clear legal right as comprehended in mandamus is not applicable. (Italics supplied.)

4. The ruling of the Court is contrary to the law and the pleadings.

5. The ruling of the Court is contrary to the contract evidenced by the exhibits to the complaint.

6. The Court's ruling denies plaintiff and defendant and cross-claimant Paul Price the rights guaranteed to them under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

7. *The Court's ruling denies plaintiff and defendant and cross-claimant Paul Price, the rights guaranteed to them* under Section 10, Article I of the Constitution of the United States, and *under Section 1, Article XIV of the Amendments to the Constitution of the United States.* (Italics supplied.)

8. Plaintiff's action and defendant and cross-claimant Paul Price's cross-claim, are not suits against the State of West Virginia within the prohibition of Section 35, Article VI of the Constitution of West Virginia, nor proceedings in mandamus, *but are an action and cross-claim to declare plaintiff's and cross-claimant's rights and compel the performance of a statutory duty by the defendant Burl A. Sawyers as State Road Commissioner.* (Italics supplied.)

9. Such other reasons as may be later assigned by plaintiff and cross-claimant on an appeal.

May 21, 1964

ENTER

FRANK L. TAYLOR
Judge

APPROVED AS TO FORM:

ANTHONY G. HALKIAS,
Attorney for Defendants
The State Road Commission
and Burl A. Sawyers as
State Road Commissioner

JAMES W. ST.CLAIR,
Attorney for the defendant
and cross-claimant, Paul Price

CARNEY M. LAYNE,
Attorney for plaintiff,
R. C. Wetherall, Jr.

APPENDIX E

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor or others*, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission*, pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor*, showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia 1961, 1964 Cumulative Supplement, (Serial Section 1452), p. 171.) (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR. —*All work of construction * * * of state roads * * *, and the furnishing of all materials and supplies therefor * * * shall be done and furnished pursuant to contract * * ** (Chapter 143, Acts of the Legislature, Regular Session, 1957, p. 687; Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code of 1961 (Serial Section 1474 (1) (p. 880). (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.— * * * (Chapter 3, Acts of the West Virginia Legislature, Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code of 1961 (Serial Section 1474(2) p. 881).

Section 21. FORM OF CONTRACT; SIGNING.— * * * (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia, 1961 (Serial Section 1474(3) p. 882).

Chapter 20, Article 5, of the Code of West Virginia, 1931, as amended by Chapter 20 of the Acts of the Legislature of West Virginia, Regular Session 1964, p. 1400; Chapter 20, Article 5, Sections 6 et seq. of Michie's West Virginia Code of 1961, 1964 Cumulative Supplement (Serial Sections 2312(16); p. 294, 291:

PART II. SLACK-WATER DAMS.

Section 6. LOCATION AND CONSTRUCTION OF SLACK-WATER DAMS.—The state road commissioner, in constructing public highways, bridges and culverts, as provided by law, and any municipal cor-

poration constructing or improving public streets, viaducts, bridges and culverts, either severally or jointly, upon request of the director of the department of natural resources and with the approval of the state road commissioner, may construct and maintain slackwater dams in connection with such public highways, streets, bridges, culverts or viaducts so as to create reservoirs, ponds, water parks, basins, lakes or other incidental works to conserve the water supply of the state.

Section 7. DAM CONSTRUCTION INITIATED; APPROVAL BY PUBLIC AUTHORITY; COSTS; PLANS.—

• • •

Upon approval of the plans and specifications and the determination to proceed with the project, the director shall enter into an agreement with the public authority on the distribution of the cost and expense of the construction of such dams and incidental works in connection therewith. The portion of the cost to be paid by the department shall be paid from any funds appropriated for or paid into the department and available for such purpose. No public authority shall proceed with the construction of such a project until there is full compliance with the other requirements of law relative to the construction of dams and the director shall have satisfied the public authority that sufficient funds are available for the completion of the dam.

Such dams shall be constructed under and subject to any and all laws governing the construction of state, county or municipal highways, streets, viaducts, bridges or culverts. Any public authority undertaking construction pursuant to this article shall proceed in the same manner as provided for the construction of public highways or street improvements.

• • •

Section 8. REQUESTS TO DIRECTOR FOR DAM CONSTRUCTION; COSTS; PROCEDURE.—

• • •

Section 9. PAYMENT OF DAM COSTS; DEFICIENCIES AND REFUNDS.—

• • • •

Section 10. CONTRACTS FOR DAM CONSTRUCTION.—In the construction of slack-water dams, reservoirs and other incidental works, the state road commissioner and the public authority of a municipality shall proceed as provided by law and shall enter into contracts as provided by law.

• • •

APPENDIX F

R. C. WETHERALL, JR.,

Plaintiff,

VS. Civil Action No. 3921

STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND PAUL PRICE,

Defendants.

PAUL PRICE,

Defendant and Cross Claimant,

VS.

STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Defendants and Cross Defendants.

On motion of the plaintiff R. C. Wetherall, Jr., and the defendant and cross claimant Paul Price, this Court, in addition to the orders made herein, orders it to be and it hereby is certified and by this order made a part of the record of this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the plaintiff and on behalf of the cross claimant, upon the motion to dismiss by the defendants, The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, State Road Commissioner, it was insisted and relied upon by said plaintiff and by said cross claimant, that the application of section 35, Article VI of the Constitution of West Virginia, to this case would deprive plaintiff and cross claimant of their property with-

out due process of law contrary to section 1 of the Fourteenth Amendment to the Federal Constitution; and the question was not determined favorably to the plaintiff and to the cross claimant as appears from the entry and final order of dismissal made herein, to all of which counsel for the defendant objects and excepts upon the ground that said issues were not shown upon the record.

This Court further orders it to be, and it is hereby, certified and by this order made a part of the record in this case, that the petition to the Supreme Court of Appeals of West Virginia, from the final order of this Court, having been refused, that this is the highest Court in the State of West Virginia in which a decision could be had.

All of which is accordingly ADJUDGED and ORDERED, and the Clerk directed to enter the within order and certificate in the Order Book of this Court.

ENTER:

FRANK L. TAYLOR,
Judge of the Circuit Court of Kanawha County, West Virginia

PRESENTED BY:

CARNEY M. LAYNE,
Of Counsel for plaintiff, R. C. Wetherall, Jr. and Cross Claimant, Paul Price

INSPECTED BY:

ANTHONY G. HALKIAS,
Counsel for defendants, State Road Commission of West Virginia, a corporation, and Burl A. Sawyers as State Road Commissioner

APPENDIX G

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

R. C. Wetherall, Jr.,

Plaintiff,

v.

Civil Action No. 3921
For Declaratory Judgment
and Coercive Relief

The State Road Commission of West Virginia, a corporation, Burl A. Sawyers, as State Road Commissioner, and Paul Price,

Defendants.

COMPLAINT

TO THE HONORABLE FRANK L. TAYLOR, JUDGE OF SAID COURT:

This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and in accordance with Rules 17(a) and 57 of the Rules of Civil Procedure, and the plaintiff, R. C. Wetherall, Jr., says as follows:

I

That the defendant The State Road Commission of West Virginia, hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as amended; that the office of State Road Commissioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the defendant Burl A. Sawyers, as State Road Commissioner of West Virginia, hereafter referred to as "Road Commis-

sioner", has been duly appointed and is presently acting as such; that the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor; that it is the duty of the Road Commissioner to ascertain the performance of work done under the contract and the amounts due thereunder; and by virtue of Chapter 17, Article 3, Section 4, of said Code, it is the duty of the Road Commissioner to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof.

II

That on October 28, 1960, the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, hereafter called "Contract" with the defendant Paul Price, hereafter called "Price", for the construction of Project 5824 and 7645, called "Castlemen Run Road" located in Brooke and Ohio counties, West Virginia, the documents for which contract consist of the following items: (1) The contractor's proposal upon the Commission's form and on its conditions contained; (2) the contract instrument; (3) the Special Provisions to said contract; (4) the contract bond; (5) the plans and drawings, consisting of two separate sets, 33 sheets for the work on the Road Commission right-of-way, and 7 sheets for the work on property of the West Virginia Conservation Commission; and (6) the bound volume designated The Standard Specifications, Roads and Bridges, State Road Commission of West Virginia, Adopted 1952; copies of Items (1) to (4) and a copy of sheets 1-13 inclusive of the roadway plans and sheets and all 7 sheets of the dam and causeway plans of Item 5 are attached hereto and collectively marked Exhibit A, and a copy of the remaining sheets of Item (5) and a copy of Item (6) will be furnished and tendered as Exhibit B upon the request of the Court or either party defendant hereto.

III

That said contract was bid and was entered into upon the basis of unit prices for estimated quantities of items of work and material as estimated by the Road Commission, and the total estimated contract price, based on estimated quantities was $134,895.50; that said estimated quantities are subject to the requirements of the project, being either more or less than estimated, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for the quantities actually required; that said contract provided among other things, that the Road Commission would each month estimate the amount of work performed by Price and compute the value thereof from the unit prices, and after deducting Five (5) Per Cent retainage, pay Price therefor once a month for the work performed in the preceding month.

IV

That the bid and contract covered (1) highway construction for the Road Commission on its right-of-way, and (2) dam and causeway construction for the Conservation Commission of West Virginia, hereafter called "Conservation Commission", on its recreational area property which adjoined the Commission's right-of-way, and which dam and causeway construction was undertaken by the Conservation Commission through the office and facilities of the Road Commission.

V

That the bid and contract included under the highway construction for the Road Commission itself, work designated as Item 2, Unclassified Excavation, which is paid for as the removal of material, without selection, and which, except to the extent provided in the Special Provisions concerning material for the dam and causeway, was to be dumped in a waste pit.

VI

That the bid and contract included under the dam and causeway construction for the Conservation Commission on its recreational area work designated as Item 3, Borrow Excavation, hereafter called "borrow", and work designated as Item 6, Causeway Embankment Fill, hereafter called "causeway embankment"; that the Special Provisions (Sheet 2 of 7 sheets of Conservation Commission plans and drawings, and Page 3 of Schedule of Prices on bid form) required the material that was to be used in the dam and causeway on the recreational area to be selected and taken from (1) the material removed in the roadway excavation upon the Road Commission's right-of-way, and from (2) the core trench and spillway excavations on the Conservation Commission's property, and the cost of selecting, segregating, hauling, placing and compacting according to the Technical Specifications of the Conservation Commission was required to be included in the unit bid price under said Items 3 and 6.

VII

That Section 2.3.1 of the Standard Specifications describes borrow as material required to complete the roadway and not obtainable within the limits of the right-of-way; that said material was not required to complete the roadway but was required to make the dam and causeway on the Conservation Commission's property used as a recreational area; that if said Conservation Commission's recreational area would be considered "roadway", said Section 2.3.1 is inconsistent with the express provisions of the Special Provisions mentioned in VI above; that Section 1.4.3 of the Standard Specifications provides that in the event of any conflict between the Standard Specifications and the Special Provisions, the latter shall take precedence; and plaintiff avers that the instructions upon the bid proposal and plans and drawings take precedence over Section 2.3.1 of the Standard Specifications, and that Price was to

be paid the unit bid price of sixty cents p
material excavated and removed from the roadway, and which payment was to cover work involved in removal, blasting, digging, etc., and in addition thereto, Price was to be paid the unit bid price of fifty cents per yard for so much thereof as was used in the dam and causeway and which payment was to cover the cost of work involved in selecting, segregating, hauling, placing and compacting in the dam and causeway according to the Conservation Commission's Technical Specifications contained in the Special Provisions.

VIII

That by employment contract dated November 29, 1960, between plaintiff and Price, plaintiff undertook to perform the actual work on said project according to the terms contained therein for ninety per cent (90%) of the unit bid prices less the cost and expenses thereof, a copy of which contract is attached hereto marked Exhibit C; and that plaintiff was to be paid for the same quantities of work for which Price was to receive payment from the Road Commission; that plaintiff did thereafter perform such work, including the unclassified excavation, borrow, and causeway embankment, and did excavate and remove from the roadway on the Road Commission's right-of-way, 115,761 cubic yards of material designated as unclassified excavation, and did select and segregate therefrom and did haul, place and compact in the dam and causeway on the adjoining recreational area property of the Conservation Commission, 41,695.5 cubic yards thereof designated as borrow, and 11,847 cubic yards thereof designated as causeway embankment, measured in place by the Road Commission, and that said project and all of the work included therein has been approved and accepted by the Road Commission, and that plaintiff has a subsisting and beneficial interest in the payment therefor by the Road Commission to Price, and plaintiff is a real party of interest.

IX

Plaintiff is informed and believes that upon the progress of the work included in the unclassified excavation, borrow, and causeway embankment, the Road Commission calculated by monthly estimate the estimated quantities thereof, including borrow, and the amount due therefor at the unit price, and the Road Commissioner issued his periodic requisition therefor, including borrow, upon the State Auditor for payment to Price of the amount therefor, including borrow, due upon each monthly estimate; that upon the completion and acceptance of said work the Road Commissioner calculated the final and total estimate of quantities thereof and the amount due therefor, and allowed for payment said 41,695.5 cubic yards of borrow, 11,847 cubic yards of causeway embankment, and approximately 60,000 cubic yards of unclassified excavation, the last which figure is incorrect; that plaintiff is informed and believes that upon protest from Price as to the quantity of unclassified excavation, the Road Commission recalculated said estimates and increased the unclassified excavation from approximately 60,000 cubic yards to the correct amount of 115,761 cubic yards, but totally eliminated the 41,695.5 cubic yards of borrow, and backcharged the amounts previously paid for such borrow to amounts due upon the unclassified excavation, and that the Road Commissioner has refused to issue his requisition for payment of the work represented by 41,695.5 cubic yards of borrow.

X

That Price has refused to prosecute any claim for payment for such item designated as borrow, and upon request refused to formally assign such claim to plaintiff to prosecute, for the stated reasons he had only a 10% interest therein and that he did not want to antagonize the Road Commission, well knowing that 90% of the loss that would result from a failure to collect such sum due for the work designated as borrow would be borne by plaintiff.

XI

That no dispute exists between any of the parties hereto as to the work performed on the items designated as unclassified excavation and borrow, nor any dispute as to the quantities of said work, but only a dispute as to whether under the terms of the contract the Road Commission is obligated to pay for the borrow. The plaintiff claims Price, and through Price, the plaintiff, is entitled to be paid for 41,695.5 cubic yards of work designated as borrow, as well as to be paid for the work designated as unclassified excavation, for the reason the bid instructions directed the cost of selecting, segregating, hauling, placing and compacting in the dam to be included in the bid price for the item designated borrow; that said borrow work was not on the roadway but was on the recreational area property of the Conservation Commission; and that the Special Provisions having instructed Price and plaintiff as to where the material was to be secured and how the cost of selection, segregation and manipulation was to be paid for, under Section 1.4.3 of the Standard Specifications, said Special Provisions control. The Road Commissioner refuses to pay for said borrow work in the dam for the alleged reason Section 2.3.1 of the Standard Specifications allegedly prohibits payment for borrow coming from roadway excavation, notwithstanding the Road Commissioner approved payment for causeway embankment which also came from roadway excavation.

XII

That Paul Price has been made a defendant hereto so that all parties of conceivable interest are before the Court.

WHEREFORE, Plaintiff prays that the Court will:

1. Declare the right of Paul Price to be paid by the Road Commission the sum of $20,847.75 for the work involved in constructing the dam and being the item designated borrow, in addition to the sum of $69,456.60 for the removal of

118,761 cubic yards of unclassified excavation which has already been approved for payment.

And for further and coercive relief, the plaintiff asks judgment that the Road Commissioner be compelled to perform his statutory duty to issue the requisition of the Road Commission to the State Auditor for the payment to Price for such work, so that plaintiff may be paid therefor by Price, and that plaintiff might have such other and further relief, both general and special, as to the Court may seem appropriate in the premises.

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

TOM T. BAKER
640 Fifth Avenue
Huntington, West Virginia

Attorneys for the Plaintiff,
R. C. Wetherall, Jr.

APPENDIX H

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

R. C. Wetherall, Jr.,
Plaintiff,

vs.

For Declaratory Judgment
and Coercive Relief
Civil Action No. 3921

The State Road Commission of West Virginia, a corporation, Burl A. Sawyers, as State Road Commissioner, and Paul Price,
Defendants.

THE AMENDED ANSWER OF PAUL PRICE TO PLAINTIFF'S COMPLAINT THE CROSS-CLAIM OF PAUL PRICE AGAINST THE DEFENDANTS, THE STATE ROAD COMMISSION, A CORPORATION, AND BURL A. SAWYERS AS STATE ROAD COMMISSIONER

AMENDED ANSWER

1. The complaint fails to state a claim against the defendant Paul Price upon which relief can be granted, because no relief is prayed for against Paul Price.

2. Defendant Paul Price admits the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XI and XII.

3. Defendant Paul Price denies the allegations contained in Paragraph X of the complaint.

Wherefore, in the premises of the complaint and the admissions and denial in this amended answer contained, the defendant Paul Price joins in the prayer of the plaintiff,

B. C. Wetherall, Jr., and prays the Court to transpose him from a party defendant to a co-party plaintiff.

CROSS CLAIM AGAINST THE STATE ROAD COMMISSION, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

1. Affirmation of allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, XI and XII of plaintiff's complaint.

WHEREFORE, in the premises of plaintiff's complaint and the amended answer of this defendant Paul Price, and the affirmation of allegations as in this cross-claim contained, the defendant and cross-claimant Paul Price prays that the Court will declare his right to be paid by the Road Commission the sum of $20,847.75 for the work involved in constructing the dam, and being the item designated borrow, in addition to the sum of $69,456.60 for the removal of 115,761 cubic yards of unclassified excavation, which has already been approved for payment.

And for further and coercive relief, cross-claimant Paul Price asks judgment that the Road Commissioner be compelled to perform his statutory duty to issue the requisition of the Road Commission to the State Auditor for the payment to him for such work, and that as a cross-claimant he might have such other and further relief, both general and special, as to the Court may seem appropriate in the premises.

MARSHALL, HARSHBARGER & ST. CLAIR
By JAMES W. ST. CLAIR
Attorneys for Cross-Claimant
Paul Price

NOTICE

Please take notice that the undersigned will move the Court for permission to transpose Paul Price from a party

defendant to a co-party plaintiff, and for such other and further relief as is deemed necessary, on November 23, 1963, as soon as counsel can be heard.

MARSHALL, HARSHBARGER & ST. CLAIR,
By JAMES W. ST. CLAIR

CERTIFICATE OF SERVICE

The undersigned counsel for Paul Price does hereby certify that he has served a copy of the foregoing Amended Answer and the Cross-Claim of Paul Price upon Anthony G. Halkias, Attorney for State Road Commission of West Virginia, Capitol Building, Charleston, West Virginia; upon Burl A. Sawyers, State Road Commissioner, Capitol Building, Charleston, West Virginia; upon Carney M. Layne, 638 Fifth Avenue, Huntington, West Virginia, and Tom T. Taker, 640 Fifth Avenue, Huntington, West Virginia, Attorneys for R. C. Wetherall, Jr., by mailing a true copy of the same to each of them at their office, this 15th day of November, 1963.

MARSHALL, HARSHBARGER & ST. CLAIR,
By JAMES W. ST. CLAIR

APPENDIX I

Pertinent Provisions of Contract Document Showing Patent Error in Road Commissioner's Interpretation and Which Trial Court Refused to Interpret.

A. Provisions contained in *Special Provisions and Specifications Pertaining to Dam Construction* authorizing payment for dam construction under Item 3, termed Borrow Pit Excavation.

(1) In The Bid Proposal Directions and On The Plans and Drawings:

The Instructions under "note" on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of Plans styled "Conservation Commission of West Virginia, Division of Engineering, Castleman Run Lake No. 1., Brooks and Ohio Counties," (both part of Complaint Exhibit A) provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation*, core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam and causeway shall be included in the unit cost bid for Item 3 and Item 6.*" (Italics supplied). (Items 3 and 6 and respectively "Borrow Pit Excavation" and "Causeway Embankment Fill"—Ed.)

(2) In The Specifications:

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Exhibit A—Proposal, Schedule of Prices, p. 2, Line 10). The dam construction covered by this item and to be paid for by the quantity of material used, is specifi-

cally described in section 3.14 of the "Technical Specifications, Castlemen Run Lake No. 1" (p. 6) (part of Complaint Exhibit A and being a "Special Provision") which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION

3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans or as directed by the Engineer.

The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthen embankment and outlet channels in accordance with the drawing and specifications, work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. Provision contained in Road Commission's *Standard* Specifications Roads and Bridges pertaining to Borrow.

Section 2.3.1 page 54, of "The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1953" (414 page blue printed volume—part of Complaint Exhibit A) provides as follows:

"BORROW EXCAVATION
2.3.1 DESCRIPTION

This item shall consist of excavating, transporting, place and finishing material *to complete the roadway and embankments; which material is not obtainable from any other item of excavation or within the limits of the right-of-way.* Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission." (Italics supplied).

On the supposed basis that the application of this *standard* provision precluded payment for the dam construction under Item 3, Borrow Pit Excavation, the Road Commissioner refused payment, on the ground the material used in the dam came from the right of way excavation, *notwithstanding the proposal, special provisions and plans as heretofore set forth expressly directed it be taken from roadway excavation,* and notwithstanding that by other provisions of the standard specifications hereafter set forth, the proposal, special provisions and plans governed and took precedence over the *standard* specifications.

C. Provision contained in Road Commissions Standard Specifications, Roads and Bridges, giving precedence to proposal, special provisions and plans over standard specification in case of discrepancy or conflict.

Section 1.5.4, page 17, of "The State Road Commission of West Virginia, Standard Specifications, Roads and Bridges, Adopted 1959" (blue printed volume part of Complaint Exhibit A) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project,* (as was the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrepancy*, figured dimensions shall govern over scaled dimensions, *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Commission. Accordingly, section 1.4.3 of the Standard Road Specifications is also of applicability and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith." (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four single-spaced legal size sheets, describing the work involved in the item. The last section of this item, "3.14 Basis for Payment," previously quoted, states that for the dam construction work "payment will be made at the price bid per cubic yard" of "Borrow Pit Excavation."

Without the application of any rules of construction, the

contract is express as to meaning and the Road Commissioner's "interpretation" is violative of the contract as prepared by the Road Commission itself, and patently wrong.

APPENDIX J

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of March, 1965, the following order was made and entered, to-wit:

R. C. WETHERALL, JR.

VS. **Civil Action No. 3921**

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION,

BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND PAUL PRICE,

Defendants Below,

PAUL PRICE,

Cross-Claimant Below

On a former day, to-wit, January 6, 1965, came the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Claude M. Morgan, his attorneys, and Paul Price by Marshall, Harshbarger & St. Clair and James W. St. Clair, his attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in this action on the 21st day of May, 1964, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX B

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia
PHILIP J. GRAZIANI
Deputy Attorney General
State of West Virginia
Charleston, West Virginia
C. ROBERT SARVER
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

R.C. WETHERALL, Jr. and Paul Price
v. Appellants
THE STATE ROAD COMMISSION OF WEST VIRGINIA,
A CORPORATION, AND BURL A. SAWYERS,
AS STATE ROAD COMMISSIONER, Appellants

On Appeal from the Circuit Court of Kanawha County, West Virginia

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Motion to Dismiss Appeal for Lack of Jurisdiction.

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STATEMENT FOR THE CASE

On October 28, 1960, Appellant Price was awarded a contract by appellee State Road Commission involving certain road, dam and causeway construction. On November 29, 1960, Price and appellant Wetherall entered into a contract whereby Wetherall would perform all of the work called for in Price's contract with the State Road Commission and, in return, would receive 90% of the money to be paid Price. At no time was appellee informed of this clandestine agreement and during the course of the work, which dragged on for some time after the scheduled completion date, various subterfuges were employed to disguise the true status of the person actually performing the work.

Upon completion and acceptance of the project, a dispute arose between Price, who still represented himself as having performed the work, and the State Road Commission, over certain provisions in the work specifications. It was only then that appellant Wetherall came upon the scene and commenced a declaratory judgment action in the Circuit Court of Kanawha County, West Virginia, naming Price, the Road Commission and its Commissioner as defendants. This action, filed - September 24, 1963, asked:

1) That a certain provision of the contract between Price and the Road Commission be interpreted and the rights of the parties declared; and,

2) that after an interpretation and declaration of rights, the Road Commissioner be compelled to perform his statutory duty to audit Price's claim for the extra work allegedly performed.

Appellant Price subsequently asked leave of court to become a cross-claimant and such petition was granted.

On May 21, 1964, the Circuit Court of Kanawha County entered its final order sustaining appellees' motion to dismiss appellants' complaint and cross-claim. It is this judgment order from which relief is sought..

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of The Supreme Court of the United States, move that the jurisdictional

statement of appellants be dismissed on the ground that the judgment rest on an adequate non-federal basis; and, that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on in the court below.

ARGUMENT

I

It is manifestly clear that the dismissal of the complaint as to appellant Wetherall was based on an adequate non-federal ground, that is, he was not a real party in interest as contemplated by Rule 17 (a) of the West Virginia Rules of Civil Procedure. (see appendix A.) It is noted that the West Virginia and Federal provisions are very similiar. The trial court correctly held that Wetherall was not within the scope of Rule 17 (a) since:

> "Most authorities agree that the real party in interest is the party who, by the substantive law, possessed the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." 2 Federal Practice and Procedure, Barron and Holtzoff, §482, page 7, et. seq.

Rule 17 (a) of the Federal Rules of Civil Procedure has been construed to require that actions shall be prosecuted in the name of the real party in interest who is the person owning, either legally or equitably, the claim upon which relief is sought, according to the substantive law of the state. Rosenfeld v. Continental Building Operating Co., 135 F. Supp. 465; Capo v. C-O Two Fire Equipment Co., 93 F. Supp. 4. Rule 17 (a) 's intent is to require that the action be prosecuted in the name of the party, who by the substantive law, has the right sought to be enforced. Rock Drilling etc. v. Mason et al, 217 F2 687; (cert. denied 349 U.S. 915). 3 Moore's Federal Practice (2nd Ed.) pp. 1305-1311.

In Ison et al v. Crisp Corp., 146 W.Va. 786, the West Virginia court quotes with approval the following language from German Alliance Insurance Company v. Home Water Supply Co. 226 U.S. 220:

> "* * * a contract is only intended for the benefit of those who made it.
>
> Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he

must at least show that it was intended for his direct benefit." (Emphasis supplied).

Appellant Wetherall sought the construction of a contract to which he was not a party. The decision of the trial court, found as Appendix A to Appellants' Jurisdictional Statement, shows that more than a month elapsed between the date of the contract between Price and Appellees' and the date of the "employment contract" between appellants. By various stratagems and for unknown reasons, appellants conspired to convince appellees' agents that Price was actually the party performing the work. The contract performance bond listed Price as the principal and one wonders whether Wetherall would have come forward so quickly had Price been sued on his bond. The facts are plain that Wetherall was not a party to the contract and, that if he has any cause of action, it is against Price.

II

The judgment of the Circuit Court of Kanawha County also rests on an adequate non-federal ground in dismissing Price's cross-claim since the court did not preclude Price from any relief at all, but merely told him that he was proceeding in the wrong manner. Since there is no doubt that a proceeding in mandamus would only lie where there is involved the performance of a plain legal duty, not involving the performance by public officials of discretion or judgment, Draper v. Anderson, 102 W.Va. 633, it becomes evident that Price should have resorted to the claims procedure established in the State of West Virginia. Chapter 14, Article 2 of the Code of West Virginia (Michie) states:

"The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the Court of Claims, "* * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * *" cannot be heard in a court of law * * *." Code 14-2-3.

(Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

"The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:

"1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

"2. Claims and demands, liquidated and unliquidated, ex-contractu and ex-delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.

"3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

There is nothing in the record to show that Price attempted to avail himself of the easily accessible claims procedure.

Appellant Price enjoyed the choice of another course of action as well in that, since he complains that his property has been taken without due process, he could have instituted proceedings to have

the Road Commissioner condemn his property by eminent domain.

Article III, Section 9 of the Constitution of West Virginia states, in part:

> "Private property shall not be taken or damaged for public use without just compensation."

Appellees admit that the concept of Eminent Domain as it pertains to property other than real property or interests therein is not as well known as the realty aspect. It must be noted, however, that the concept is not unknown in several jurisdictions.

Speaking of the Federal Constitutional provision that private property shall not be taken for public use without just compensation, it has been said:

> "The Constitutional provision is addressed to every sort of interest the citizen may possess."

U.S. v. General Motors, 323 U.S. 373; U.S. v. Certain Lands, etc, 220 F. Supp. 696.

In the case of Graham v. City of Duncan, 354 P2d 458, the syllabus by the Oklahoma court states:

> "The term 'property' as used in the Oklahoma constitution... regarding the taking of private property for public use for which just compensation must be paid includes not only real estate held in fee, but also ensement, personal property and every valuable interest which can be enjoyed and recognized as property."

The case of Lynch v. U.S., 292 U.S. 571, has held that a valid contract was property.

It is believed that Price could have, and still can, avail himself of the remedy of mandamus; not a mandamus as envisioned in Draper (supra) but rather a mandamus to compel the State Road Commissioner to institute eminent domain proceedings against his 'property.' A full hearing on the facts is assured and the discretion of the Commissioner is not forced. The following cases state that such a mandamus action will be as pertaining to real estate. State v. Graney, 143, W.Va. 643; Riggs v. State Road Commissioner, 120 W.Va. 298; Hardy v. Simpson, 118 W.Va. 440; Childers v. State Road Commissioner, 124 W.Va. 233.

III

It is evident from the record, and from appellants' jurisdictional statement that the issue of the repugnance of Section 35, Article VI

of the West Virginia Constitution to any provisions of the Federal Constitution was not raised in a timely fashion.

Section 1257 (2), Title 28, United States Code, relied upon by Appellants for their jurisdiction before this Court, requires that the repugnance be raised by timely insistence in the state court. In Raley v. State of Ohio, 360 U.S. 423, this Court stated :

> "It is essential to our jurisdiction on appeal . . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution."

In Slagle v. Ohio, 366 U.S. 259, it is held that appellants must show that a "timely" insistance was made in the state courts and that a state statute as applied is repugnant to the Federal constitution. Otherwise, an appeal will be dismissed.

An examination of the complaint originally filed by Wetherall, and later ratified by cross-claimant Price, fails to disclose any mention of the alleged taking without due process of law. (See Appendix G and Appendix H in Appellants Jurisdictional Statement) The opinion of court below, reproduced as Appendix A in Appellants' Jurisdictional Statement, makes no specific or general mention of the issue of due process.

Subsequently, appellants procured an order of the trial court stating that the

> "application of section 35, Article VI of the Constitution of West Virginia, to this case would deprive (appellants) of their property without due process of law contrary to section 1 of the 14th Amendment to the Federal Constitution."

It will be noted (Appendix F, Appellants' Jurisdictional Statement) that Appellees strenuously objected and excepted to this on the grounds that the assertion was not shown on the record. This subsequent court order, which was not secured until June of 1965, is the first instance wherein the Federal questions are raised.

CONCLUSION

As noted in appellant's jurisdictional statement at page 12, this case is similiar in many respects to Appeal No. 144, October, 1965, term of this Court. It cannot be too strongly urged that this Court should not take jurisdiction of this case for the reasons as set out herein. It is believed that appellants are not within the purview of 28 USC §1257 and it is respectfully submitted that their ju-

risdictional statement should be dismissed.

September 2, 1965

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Deputy Attorney General
State of West Virginia
Charleston, West Virginia

C. ROBERT SARVER
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

APPENDIX A

Rule 17.

Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, or any other fiduciary, or a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in his own name without joining with him the party for whose benefit the action is brought; and in subrogation and similar cases, the court shall apply this subdivision as will promote justice. When a law of the State so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

WETHERALL ET AL *v.* STATE ROAD COMMISSION OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY.

No. 428. Decided October 25, 1965.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. *Price d/b/a Howard Price & Co.* v. *State Road Commission of West Virginia et al.*, No. 144 October Term 1965, decided October 11, 1965.

APPENDIX D

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

March 11, 1966

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

James W. St. Clair, Esq.
Attorney at Law
523 Seventh Street
Huntington, West Virginia

Charles W. Yeager, Esq.
Attorney at Law
608 Kanawha Valley Building
Charleston, West Virginia

Anthony G. Halkias, Esq.
Legal Division, State Road Commission
1800 Washington Street, West
Charleston, West Virginia
Gentlemen:

R. C. WETHERALL, JR. v. STATE ROAD COMMISSION, et al

By order of this Court, entered January 5, 1966, the petition in this case was filed and a rule in mandamus issued, directed to the respondents to show cause why a writ of mandamus should not be awarded compelling the relief prayed for in the petition. The petition states that "The subject matter of this proceeding is the same as in Civil

Action No. 3921, styled 'R. C. Wetherall, Jr. and Paul Price vs. The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner' '', and recites the former determination thereof. Attached to the petition are several exhibits, including the pleadings and decision in the former case, as a part of the Jurisdictional Statement filed in the United States Supreme Court. In view of the fact that the subject matter of this proceeding is the same as in the former case, and since my opinion in the former case is made a part of the record in this case, I see no reason to again recite the material allegations of the petition.

This case now comes on upon the respondents' demurrer to the petition, filed January 20, 1966, setting forth ten separate grounds in support thereof. The first ground of the demurrer states that the petition is not sufficient in law, in that it asserts an action against the State for the recovery of money alleged to be owing under a highway construction contract between petitioner Paul Price and the respondents, such action being prohibited by Article VI, Section 35 of the Constitution of West Virginia. The factual situation, as shown by the petition in this case, is very similar to that in the case of *Howard Price* v. *The State Road Commission,* decided by me on this date, in that it is alleged that the petitioners performed construction work under a contract with the State Road Commission for which they have not been paid. In the instant case, it is alleged that work was performed under the terms of the contract with the Road Commission; that for some of the work done the Road Commission calculated monthly quantities thereof and certified the amounts due to the State Auditor, but that upon completion and acceptance of the work, the amount of work calculated and compensation certified was arbitrarily revised to eliminate a portion thereof, depriving the petitioners of payment therefor. Whereupon, the petitioners assert a property right in the said contract and in the work performed and material furnished, and contend

that they may not be deprived thereof without just compensation, perforce the Fifth Amendment to the Federal Constitution and Article III, Section 9 of the State Constitution.

The constitutional question raised by the first ground of the respondents' demurrer is discussed by me in the decision in the *Howard Price* case, of this date, and for the reasons therein stated, the demurrer will be sustained upon this ground. I would, however, as in the *Howard Price* case point out that while there are situations wherein our Supreme Court of Appeals, under the provisions of the State and Federal Constitutions, prohibiting the taking of private property without just compensation, will compel condemnation in order to compensate the property owner, the clear legal right required to be shown by the petitioner, does not appear here. Moreover, the particular circumstances of the dispute involving the contract in this case have been formerly considered by me upon the question of demonstrating a clear legal right, in the former adjudication between the parties, and decided adversely to the petitioners. Accordingly, grounds 2 and 7 of the demurrer are sustained as *res judicata*.

Grounds 3 and 4 of the demurrer assert that respondents have not taken any property or property right of the petitioners which is the subject of an eminent domain proceeding. The subject matter of this proceeding, being essentially the same as that in the *Howard Price* case, I am of opinion to sustain these grounds of the demurrer for the reasons given in my ruling in the *Howard Price* case, of even date.

Grounds 5 and 6, pertaining to the possibility of administrative relief through the office of the Attorney General, are also discussed by me in the opinion in the *Howard Price* case, and will be overruled for the reasons therein assigned.

Grounds 8, 9 and 10 of the demurrer, relating only to

petitioner Wetherall's claim, asserting that he is not a real party in interest since he was not a party to the contract, are grounds upon which the former proceeding involving these parties was dismissed and are, accordingly, *res judicata*. These grounds will, therefore, be sustained.

For the reasons heretofore given, the demurrer will be sustained as to grounds 1, 2, 3, 4, 7, 8, 9 and 10. An order carrying into effect these rulings, dismissing the petition, and denying the writ of mandamus, should be promptly tendered for entry and should make this letter memorandum of opinion and the memorandum of opinion in the *Price* case a part of the record. Copies for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

APPENDIX E

State of West Virginia
THIRTEENTH JUDICIAL CIRCUIT
Charleston

Frank L. Taylor
Judge

March 11, 1966

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

James W. St. Clair, Esq.
Attorney at Law
523 Seventh Street
Huntington, West Virginia

Charles W. Yeager, Esq.
Attorney at Law
608 Kanawha Valley Building
Charleston, West Virginia

Benjamin A. Ritchie, Esq.
Anthony G. Halkias, Esq.
Legal Division, State Road Commission
1800 Washington Street, East
Charleston, West Virginia

Gentlemen:

Howard Price, dba Howard Price and Company vs. The State Road Commission of West Virginia and Burl A. Sawyers as State Road Commissioner

In 1963 this plaintiff instituted an action in this Court against the State Road Commission of West Virginia, the Road Commissioner, individual members of the Road Commission, and the Director of the Construction Division of the Road Commission, praying for declaratory relief and for coercive relief, to compel the then defendants to cause

to be paid to him from State funds an amount of money which he claimed to be due under a construction contract entered into between him and the State Road Commission. That case was subsequently heard on a motion to dismiss, which motion was sustained upon the ground that it was an action against the State within the inhibition of Article VI, Section 35 of the West Virginia Constitution. That section is as follows:

> "The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

From the judgment of this Court in dismissing his action the plaintiff appealed to the Supreme Court of Appeals of West Virginia, and that Court declined appellate relief. The plaintiff then appealed to the Supreme Court of the United States for a writ of certiorari to review the findings of this Court and of the Supreme Court of Appeals, whereupon the Attorney General of West Virginia, who is required by statute to represent the State in all matters pending in Federal courts, appeared and made a motion to dismiss upon the ground that the appellant, plaintiff here, failed to make use of remedies available to him under State statutes. These remedies were described by the Attorney General as being (1) a proceeding in mandamus to compel eminent domain proceedings, and (2) the claim procedure against the State as provided for in Chapter 14, Article 2 of the Code of West Virginia. Thereupon, the Supreme Court of the United States, by a *per curiam* opinion, dismissed the appeal upon the representations of the Attorney General.

The plaintiff has now filed his petition in this Court praying for a writ of mandamus to compel the present defendants, that is, The State Road Commission of West Virginia,

a corporation, and Burl A. Sawyers as State Road Commissioner, to institute and prosecute an eminent domain proceeding in the proper court to condemn and ascertain the value of the rights of the plaintiff under his construction contract with the State. The rule in mandamus was granted, and the defendants, not now represented by the Attorney General, demurred to the petition upon several grounds. The first of these grounds is that this proceeding contravenes the provisions of Article VI, Section 35 of the Constitution. The petitioner here strongly contends and argues that Article VI, Section 35 of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner.

I have carefully compared the petition herein with the complaint formerly filed, which complaint was exhibited with the petition. The petition here, aside from the demand for mandamus, is in effect and by similarity of language practically the same as the complaint filed in the former action. The contract is described in the same manner, the alleged default is described in the same manner, and the claim asserted by the petitioner is practically for the same amount of money, it having been increased slightly in this petition over the amount demanded in the complaint in the former action.

Many questions have been argued and briefed by counsel dealing with issues which they claim arise in this case. However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding, and the second is whether or not the Attorney General, by his action in appearing before the Supreme Court of the United States and making

the motion to dismiss, has estopped the State from its right to defend upon the ground that this is in effect an action against the State.

As noted, Article VI, Section 35 of the Constitution of West Virginia differs from the Federal Constitution in that it prohibits absolutely any action against the State, except in garnishment proceedings, whereas the Federal Constitution makes provision that the Government of the United States may not be sued without its consent. It is apparently the Federal rule that contract rights between the nation and individuals are only binding upon the conscience of the sovereign, and have no compulsive force and confer no right of action independent of the will of the sovereign. See *Monaco* v. *Mississippi*, 292 U.S. 313, 78 L. ed. 1282, and *Lynch* v. *United States*, 292 U.S. 571, 78 L. ed. 1434. However, in *Miller* v. *Board of Agriculture*, 46 W. Va. 192, dealing with the West Virginia Constitution, it was held that "A mere contract will not be enforced by mandamus." In discussion of this point, the following language is used in the opinion written by Judge Brannon:

> "* * * A contract with the State is without legal sanction, as it cannot be enforced by judicial action. The only remedy is appeal to the officers charged with its execution, and, when executed, to the Legislature to pay. * * *."

It is true that in that instance the Court was speaking of an executory contract, but it is my opinion that the principle prevails here. I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here.

This question, however, is not completely controlling. The action of the Attorney General in making his motion in the Supreme Court of the United States may or may not have been ill-advised. It is true that the Attorney General of West Virginia is the chief law officer of the State. See

State v. *Ehrlick*, 65 W.Va. 700. However, the question here is whether, being clothed with this authority, the Attorney General can estop the State and waive its rights. As was said in *State* v. *Chilton*, 49 W.Va. 453, 456:

> " 'Grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Such an officer can create rights against the State or other public authority represented by him only while he is keeping strictly within the limits of his authority as so construed.' * * * 'This rule is indispensible to guard the public against loss and injury from the fraud, mistake or rashness and indiscretion of their agents.' * * *."

I have read much authority upon the question of judicial estoppel arising in instances such as this, some of which has been cited to me by counsel and some of which I have discovered by my own research. It is said in *7 Am. Jur. 2d, Attorney General*, § 15:

> "Although there is some authority to the contrary, it is generally held that unless duly authorized by law, the attorney general may not waive the immunity of the state from suit, and thus cannot bind the state by appearing in an action so as to give the court jurisdiction. Nor can the attorney general give up rights of the state by an admission in court as to the legal effect of a statute."

In *19 Am. Jur., Estoppel*, § 77, the rule is laid down that a court cannot acquire jurisdiction of the subject matter of litigation by estoppel.

And in *49 Am. Jur., States, Territories and Dependencies*, § 96, it is stated in a footnote that where the State merely makes a special appearance for the purpose of protesting against the court's jurisdiction, there is no waiver of immunity.

In *Cunningham* v. *County Court of Wood County* (W.Va. 1964), 134 S.E. 2d 725, it is said at page 729:

"The general rule is that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. 31 C.J.S. Estoppel §§ 138-142, pages 675-719; Anno., 1 A.L.R. 2d 338."

In the annotation just referred to in the quotation, the subject is discussed and many cases are cited with the statement made that claims cannot be created against the State by estoppel.

In the recent case of *Main* v. *Department of Highways* (Va. 1965), 142 S.E. 2d 524, the statement is made that the doctrine of estoppel cannot apply to the rights of a state when acting in its sovereign or governmental capacity. See also *Ford Motor Company* v. *Treasury Department*, 323 U.S. 459, 89 L. ed. 389.

While the foregoing discussion, in my opinion, necessitates action on my part in sustaining point one of the demurrer, and while I believe that to be decisive of the controversy presented on this record, yet, being in this instance a court of original jurisdiction, it is probably incumbent upon me to rule upon the other questions raised on the record. While I personally entertain considerable compassion for the petitioner here, he being left, in the words of Judge Brannon, *supra*, as having a contract without legal sanction which cannot be enforced by judicial action, yet I must take further note of the position taken by the Supreme Court of Appeals in *Cunningham* v. *County Court of Wood County, supra*, in which it is said that:

"* * * This Court * * * is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principal which has through a long period of years been so basic in the laws of this state."

If that be true, how much more incumbent it is upon me as a judge of a *nisi prius* court to observe the Constitution and the common law of the state, and to declare as constitutional that part of the common law which has so long been pronounced in this State. I personally am of opinion that the doctrine of immunity of the sovereign as stated in our Constitution, is archaic and completely out of step with the times, when we observe the government, state and federal, engaging in big business. However, this is the rule, and I do not believe that I have the authority, or the right, or the duty to declare that Section VI, Article 35 of the Constitution of West Virginia contravenes any other section or part of either the Federal or State Constitution.

The second ground of the demurrer, to the effect that this properly involves the exercise of discretion on the part of the respondents, has already been decided by me in the former opinion written in the other proceeding on April 13, 1964, and is, in my opinion, now *res judicata*.

Grounds 3, 4, 5 and 6 of the demurrer relate to the type of property which is sought to be compelled to be condemned by this proceeding, and in my opinion the discussion had heretofore in this memorandum is decisive of those questions.

Ground 7 of the demurrer raises the question of whether or not the petitioner should have pursued and exercised his remedies of prosecuting a claim against the State through the office of the Attorney General. While this may be a proper answer in this kind of case (*Miller* v. *Board of Agriculture, supra*), yet I am not prepared to say that the prosecution of such a claim constitutes a legal remedy and gives the petitioner a day in court. However, I do not believe that it is necessary to rule upon that ground of the demurrer since here the petitioner is seeking to have his rights determined by a court and not by the executive and legislative branch of the government.

Grounds 8 and 9 raise the question of *res judicata*, and as heretofore indicated, I believe that the questions to which those grounds of the demurrer relate were decided by me in the former proceeding.

The tenth ground of the demurrer asserts that the petition fails to show a clear legal right in the petition. Even assuming that the petitioner has, by virtue of his contract with the Road Commission, acquired a vested property right subject to condemnation, and recognizing that our State Supreme Court of Appeals has construed Article III, Section 9 of the West Virginia Constitution as authority for instituting a suit to compel the State Road Commissioner, by mandamus, to compensate owners of property taken for road purposes, it is an established requirement in this State that such a suit must be predicated upon a showing of a clear legal right to the relief sought. As heretofore indicated, I have carefully compared the petition herein with the petition in the former proceeding and find that they are substantially identical, and that the present petition fails to show a clear legal right in the petitioner.

The eleventh ground of the demurrer, in my opinion, goes outside the record, and should be overruled, but I believe this ground bears no relation to the case at hand.

For the foregoing reasons, based upon the authorities cited herein and in the former opinion, which is exhibited with the record, and based upon the conclusions which I have reached, it is my judgment that the petition here in mandamus is merely a further effort on the part of the petitioner to enforce a right which, under the West Virginia Constitution, he cannot enforce in this proceeding, and I am, therefore, of opinion to sustain points 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the demurrer, deny the writ of mandamus, and dismiss the petition.

A proper order in conformity herewith, and making this letter memorandum of opinion a part of the record, should

be tendered promptly for entry. A copy for that purpose may be obtained from my secretary.

Very truly yours,
/s/ FRANK L. TAYLOR
Frank L. Taylor, Judge

APPENDIX F

R. C. WETHERALL, JR. AND
PAUL PRICE

v. UPON MANDAMUS—No. 6097

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS AS STATE ROAD COMMISSIONER

On the 29th day of January, 1966 came the Petitioners R. C. Wetherall, Jr. and Paul Price, by Carney M. Layne, Charles W. Yeager and James W. St. Clair, their counsel, and came the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, by Anthony G. Halkias, their counsel; and this matter having been regularly docketed for further proceeding this date, came on to be heard upon the mandamus petition, the order entered January 5, 1966 filing said petition; upon the rule directed to the Respondents to show cause why a writ of mandamus should not be awarded against them as prayed for in said petition, issued on January 5, 1966, returnable to January 15, 1966, allowing Petitioners to January 22, 1966 to demur or reply to Respondents' answer, if any, and setting the matter down for hearing on January 29, 1966; upon Respondents' demurrer to said petition and Respondents' answer to said petition filed January 21, 1966; upon Petitioners' demurrer to Respondents answer and Petitioners' reply to Respondents' answer filed January 29, 1966; and the same was argued by counsel, both orally and by brief.

Whereupon the Court took time to consider its decision and after mature deliberation of Respondents' demurrer to the petition, is of the opinion to and doth hereby SUSTAIN Points 1, 2, 3, 4, 7, 8, 9 and 10 of Respondents' demurrer to said Petition, and does OVERRULE Points 5 and 6 thereof; all for the reasons expressed in a letter memorandum of opinion of the Court dated March 11, 1966,

rendered in this case and in a letter memorandum of opinion of the Court dated March 11, 1966 rendered in the case of *Howard Price dba Howard Price and Company* v. *The State Road Commission* et al., Civil Action No. 6098, which letter memorandum of opinion are ordered to be, and are hereby, filed herein as a part of this order and made a part of the record in this cause. And having so ruled it became unnecessary to rule upon Respondents' answer or Petitioners' demurrer and reply thereto.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. The writ of mandamus prayed for in the aforesaid petition, be, and the same is hereby, denied;
2. Petitioners' prayer in the alternative as in the petition contained for other and further relief by way of declaratory judgment, be, and the same is hereby, denied;
3. The petition herein be, and it is hereby, dismissed without prejudice, and;
4. Respondents be, and they are hereby, awarded judgment against the Petitioners for their costs in their own behalf expended and a statutory fee of Ten ($10.00) Dollars.

To which action of the Court in overruling Points 5 and 6 of their demurrer, the Respondents, by counsel, did object and except.

And to which action of the Court in sustaining the aforesaid points of Respondents' demurrer, in denying the writ as prayed for, in denying other and further relief in the alternative by way of declaratory judgment, and in dismissing their petition, Petitioners, by counsel, did object and except for the following reasons:

1. The application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable

to the State by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives Petitioners of their property without due process of law, and constitutes the taking of private property for public use without compensation.

2. The state has consented to suit against Respondents by its participation of the highway project in the Federal Highway Program, and the application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce.

3. The inapplicability to this proceeding of Section 35, Article VI of the Constitution of West Virginia became the law of this case by virtue of the per curiam opinion of the Supreme Court of the United States rendered on Respondents' motion in appeal of Civil Action 3921 from this Court, and Respondents are judicially estopped from asserting such constitutional provision in this mandamus proceeding.

4. Petitioners' work, services, labor and material performed pursuant to the contract, incorporated in the dam for public use and appropriated by Respondents, is within the protection of the due process clause of Section 1 of the Fourteenth Amendment to the Federal Constitution and within the protection of the Fifth Amendment to the Federal Constitution as made applicable to the State by the Fourteenth Amendment, and it is a proper subject for eminent domain proceedings.

5. Petitioners have in good faith shown a reasonable cause to believe the question of their property rights, and the taking thereof, should be judicially resolved and such constitutes a clear legal right in a mandamus proceeding to compel eminent domain proceeding.

6. The application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to and denies Petitioners the rights guaranteed to them under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

7. The proceeding is not a suit against the State within the prohibition of Section 35, Article VI of the Constitution of West Virginia for the reasons (1) it involves the construction of a public dam and highway under contract to a private party, (2) is a proceeding to compel the performance of constitutional and statutory duties by Respondents, and (3) any expenditure that might ultimately be made on eminent domain proceeding would not come from the general revenue of the State bnt would come from the money specifically appropriated for the dam construction and transferred by the Conservation Commission to the State Road Commission for the express purpose of paying Petitioners for their work, services, labor and material incorporated in the public dam, and deposited in the State Road Fund as segregated by Section 52, Article VI of the State Constitution.

8. The Court's ruling is contrary to the law and the pleadings.

9. The decision of the Court in Civil Action 3921 is not res judicata as to this mandamus proceeding since the object of this proceeding and relief sought herein is not responsive to the pleading in declaratory judgment.

10. Such other reasons as Petitioners may assign on appeal.

Dated this 25th day of June, 1966.

ENTER:

FRANK L. TAYLOR
Judge

INSPECTED BY:
ANTHONY G. HALKIAS
Counsel for Respondents

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Petitioner,
R. C. Wetherall, Jr.

JAMES W. ST. CLAIR
Counsel for Petitioner,
Paul Price

APPENDIX G

STATE OF WEST VIRGINIA

At a regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of December, 1966, the following order was made and entered, to-wit:

R. C. WETHERALL, JR. and PAUL PRICE

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, August 24, 1966, came the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Charles W. Yeager, his attorneys, and Paul Price, by James W. St. Clair, his attorney, and presented to the Court his petition praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX H

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of February, 1967, the following order was made and entered, to-wit:

R. C. WETHERALL, JR. and PAUL PRICE

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, January 12, 1967, came again the petitioners, R. C. Wetherall, Jr., by Carney M. Layne and Charles W. Yeager, his attorneys, and Paul Price, by James W. St. Clair, his attorney, and presented to the Court his first and second petitions praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petitions, and notes of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused on this second application.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX I

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code (unofficial) conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor,* showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the Treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia. (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR.

—*All work of construction* • • • *of state roads* • • •, *and the furnishing of all materials and supplies therefor* • • • *shall be done and furnished pursuant to contract* • • • (Chapter 143, Acts of the Legislature, Regular session, 1957, p. 687, Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code. (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.—

• • • (Chapter 3, Acts of the West Virginia Legislature, Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code.

Section 21. FORM OF CONTRACT; SIGNING.—

• • • (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia.

Chapter 20, Article 5, of the Code of West Virginia, 1931, as amended by Chapter 20 of the Acts of the Legislature of West Virginia, Regular Session, 1964, p. 1400; Chapter 20, Article 5, Sections 6 et seq. of Michie's West Virginia Code:

PART II. SLACK-WATER DAMS.

Section 6. LOCATION AND CONSTRUCTION OF SLACK-WATER DAMS.--The state road commissioner, in constructing public highways, bridges and culverts, as provided by law, and any municipal corporation constructing or improving public streets, via-

ducts, bridges and culverts, either severally or jointly, upon request of the director of the department of natural resources and with the approval of the state road commissioner, may construct and maintain slack-water dams in connection with such public highways, streets, bridges, culverts or viaducts so as to create reservoirs, ponds, water parks, basins, lakes or other incidental works to conserve the water supply of the state.

Section 7. DAM CONSTRUCTION INITIATED; APPROVAL BY PUBLIC AUTHORITY; COSTS; PLANS.—

* * *

Upon approval of the plans and specifications and the determination to proceed with the project, the director shall enter into an agreement with the public authority on the distribution of the cost and expense of the construction of such dams and incidental works in connection therewith. The portion of the cost to be paid by the department shall be paid from any funds appropriated for or paid into the department and available for such purpose. No public authority shall proceed with the construction of such a project until there is full compliance with the other requirements of law relative to the construction of dams and the director shall have satisfied the public authority that sufficient funds are available for the completion of the dam.

Such dams shall be constructed under and subject to any and all laws governing the construction of state, county or municipal highways, streets, viaducts, bridges or culverts. Any public authority undertaking construction pursuant to this article shall proceed in the same manner as provided for the construction of public highways or street improvements.

* * *

Section 8. REQUESTS TO DIRECTOR FOR DAM CONSTRUCTION; COSTS; PROCEDURE.—

• • •

Section 9. PAYMENT OF DAM COSTS; DEFICIENCIES AND REFUNDS.—

• • •

Section 10. CONTRACTS FOR DAM CONSTRUCTION.—In the construction of slack-water dams, reservoirs and other incidental works, the state road commissioner and the public authority of a municipality shall proceed as provided by law and shall enter into contracts as provided by law.

• • •

APPENDIX J

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

R. C. WETHERALL, JR. and PAUL PRICE

Petitioners,

v.

UPON MANDAMUS

With other appropriate relief thereunder, including alternatively, for declaratory judgment with coercive relief

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Respondents.

PETITION

TO THE HON. FRANK L. TAYLOR, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA:

The Petitioners, R. C. Wetherall, Jr. and Paul Price, say as follows:

This is a proceeding in mandamus brought to compel the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, to institute proceedings in eminent domain to legally acquire from Petitioners and to pay them just compensation for, certain property belonging to Petitioners and wrongfully appropriated by the Respondents by virtue of (1) Respondents abrogation of the terms of a certain highway and dam construction contract between Petitioner Paul Price and Respondents, and (2) Respondents' wrongful appropriation for public use of work, services, labor and material performed and supplied by Petitioners and in-

corporated in a public dam construction project, and for which Petitioners have not been paid.

The subject matter of this proceeding is the same as in Civil Action No. 3921, styled "R. C. Wetherall, Jr. and Paul Price vs. The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner", instituted in the Circuit Court of Kanawha County, West Virginia. In that proceeding the Petitioners sought a declaration of their rights under the highway and dam construction contract here involved. Particularly they sought a declaration that they were entitled under the terms of the contract to have certified under the contract item designated Borrow Pit Excavation, the performance of their work, services, labor and material involved in constructing the dam, and to be paid therefor according to such item the sum of $20,847.75. In addition, Petitioners sought coercive relief compelling the Road Commissioner to certify the performance of such work and to issue his requisition to the State Auditor for the payment thereof. In such declaratory judgment proceeding the Respondents filed a motion to dismiss said proceeding on the grounds the same constituted an action against the State of West Virginia within the prohibition on Section 35, Article VI of the State Constitution. Said motion was sustained, and the proceeding dismissed.

On appeal to the Supreme Court of Appeals of West Virginia the petition for review was denied. Petitioners then appealed to the Supreme Court of the United States. The ground for such appeal was that the application of said State constitutional provision to the facts of this case deprived Petitioners of their property for public use without due process of law, and denied them a day in Court, in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution and in violation of the Fifth Amendment to the Federal Constitution as made applicable to the States by said Fourteenth Amendment. The Re-

spondents, appearing by the Attorney General of this State, filed a motion to dismiss and represented to said Court that the Petitioners had an adequate remedy through the institution of proceedings in mandamus to compel the Respondents to institute proceedings under eminent domain to ascertain just compensation for the property taken from Petitioners. The Supreme Court of the United States by per curium opinion at the October Term, 1965, dismissed the appeal, — U.S. —, 15 L Ed. 2d 37, 86 S Ct.—, citing as authority therefor the companion case at the same term (then also on appeal from this Court), styled *Howard Price, dba etc.* v. *The State Road Commission of West Virginia, et al,* the opinion in which companion case dismissed the appeal in "light of the representations of the Attorney General of West Virginia that there is open to Appellant an effective state procedure of which he has not availed himself." — U.S.—, 15 L Ed. 2d 8, 86 S Ct. —. Such prior proceeding is here pleaded so that the Court may take judicial notice thereof, and there is attached hereto marked Exhibit A, and made a part hereof, the same as if verbatim copied herein, pertinent portions of the record of such prior proceeding.

Petitioners now avail themselves of such procedure as represented by the Attorney General, and the subdividing titles being placed for convenience of reference only, further says as follows:

I

THE DEFENDANTS

A.

1. The Respondent, The State Road Commission of West Virginia, sometimes hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as Amended. The office of State Road Commissioner was created and exists under and by

virtue of Chapter 17, Article 2A of the Code aforesaid. The Respondent, Burl A. Sawyers as State Road Commissioner of West Virginia, sometimes hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such. By virtue of the Chapter and Articles of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor and to institute, prosecute, defend, suits, actions and proceedings and to otherwise exercise all powers, and functions necessary and germane to the Road Commission's public corporate existance and purposes. By virtue of Chapter 20, Article 5, Part II of the Code aforesaid, Respondents are authorized in connection with the construction of highways, to construct slack water dams, for the Conservation Commission of West Virginia, hereafter called "Conservation Commission" at the latter's expense, under its supervision and through agreement with it. By virtue of Chapter 17, Article 3, Section 4 of said Code, it is the duty of the Road Commissioner to audit the claims of contractors performing work for it and for those found correct to issue requisitions upon the State Auditor for payment thereof from the State Road Fund.

2. That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn duty to abide by and uphold the Constitution of the United States and of this State, and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty or property without due process of law as required by Section 1 of the Fourteenth Amendment of the Federal Constitution, and Section 10, Article III, of the State Constitution, nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid), and Section 9, Article III of the State Consti-

tution; and all references hereafter to said Federal Constitutional provisions shall be taken to include reference to the aforesaid similar State Constitutional provisions. In pursuance of the duties aforesaid, it is the further duty of Respondents to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property appropriated by them for public use.

II

THE CONTRACT

A.

1. The Road Commission entered into an agreement with the Conservation Commission pursuant to statute for the construction of a certain slack water dam on Castlemen Run in Brooke County for the Conservation Commission at the latter's expense.

2. Thereafter the Road Commission, through Patrick C. Graney, the then Road Commissioner, did after bid award, enter into a contract, hereafter referred to as "contract", with the Petitioner, Paul Price, for the construction of Project 5824 and 7645, called "Castlemen Run Road", located in Brooke and Ohio Counties, West Virginia. The contract consisted of the following documents: (1) The contractor's proposal upon the Commission's form and on its conditions contained; (2) the contract instrument; (3) the Special Provisions to said contract; (4) the Contract bond; (5) the plans and drawings, consisting of two separate sets, 33 sheets for the road construction work on the Road Commission right of way, and 7 sheets for the aforesaid dam work on adjoining property of the Conservation Commission; and (6) the bound volume designated "The Standard Specifications, Roads and Bridges, of the State Road Commission of West Virginia, Adopted 1952," a copy of each of which, except the roadway drawings and plans, is included herewith as part of Exhibit A.

3. Upon the signing of said contract by the parties, the Petitioner Paul Price did acquire a right of property therein within the meaning of the protection of Section 1 of the Fourteenth Amendment and the Fifth Amendment of the Federal Constitution, and likewise upon the construction of the dam under the supervision of the Petitioner R. C. Wetherall, Jr. pursuant to the agreement hereafter mentioned between Petitioners, both Petitioners acquired a right of property in the work performed, and it became and then and thereafter was the duty of Respondents to accord to Petitioners the protection of said contract and their work thereunder guaranteed by the constitutional provisions aforesaid, and not to deprive Petitioners of their rights of property therein without due process of law nor appropriate such rights of property for public use without just compensation.

B.

Said contract was by competitive bid, and was entered into upon the basis of unit prices for estimated quantities of items of work, services, labor and material, as estimated by the Road Commission, and the total estimated contract price, based on estimated quantities, was $134,895.50, and the estimated price of the part of the dam work to be performed under the item "Borrow Pit Excavation," was $21,350.00 for the estimated quantity of 42,700 cubic yards at the unit bid price of 50¢ per cubic yard. The estimated quantities were subject to the requirements of the project, being either more or less than estimated, and the total estimated contract subject to be adjusted on the basis of the agreed unit prices for the quantities actually required.

2. The bid and contract covered (1) highway construction for the Road Commission on its right-of-way, and (2) the slack water dam and causeway construction for the Conservation Commission on its recreational area property which adjoined the Road Commission's right-of-way, and which dam and causeway construction was undertaken by the

Conservation Commission through the office and facilities of the road Commission pursuant to the agreement aforesaid as authorized by statute.

C.

1. Pertinent provisions in the contract documents are as follows:

A. PROVISIONS CONTAINED IN SPECIAL PROVISIONS AND SPECIFICATIONS PERTAINING TO DAM CONSTRUCTION:

(1) In the Bid Proposal Directions and On the Plans and Drawings

The Instructions on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of the Plans and Drawings styled "Conservation Commission of West Virginia, Division of Engineers, Castleman Run Lake No. 1, Brooke and Ohio Counties," provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation,* core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam* and causeway *shall be included in the unit cost bid for* Item 3 and *Item 6.*" (Items 3 and 6 and respectively "Borrow Pit excavation" and "Causeway Embankment Fill"—Ed.) (Italics Supplied).

(2) In the Technical Specifications Pertaining to the Dam

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Proposal, Schedule of Prices, p. 2, Line 10). The part of the dam construction covered by this item and to be measured and paid for by the quantity of material used, is specifically described in section 3.14 of the "Tech-

nical Specifications, Castlemen Run Lake No. 1" (p. 6) (being a Special Provision) which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION
3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans as directed by the Engineer.

The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthern embankment and outlet channels in accordance with the drawing and specifications. Work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. PROVISION CONTAINED IN ROAD COMMISSION'S STANDARD SPECIFICATONS ROADS AND BRIDGES PERTAINING TO BORROW.

Section 2.3.1 page 54, of The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1952 (414 page blue printed volume) provides as follows:

"BORROW EXCAVATION
2.3.1 DESCRIPTION:

This item shall consist of excavating, transporting, placing and finishing material to complete the road-

way and embankments; which material is not obtainable from any other item of excavation or within the limits of the right-of-way. Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission."

C. PROVISIONS CONTAINED IN ROAD COMMISSIONS STANDARD SPECIFICATONS, ROADS AND BRIDGES GIVING PRECEDENCE TO PROPOSAL, SPECIAL PROVISIONS AND PLANS OVER STANDARD SPECIFICATIONS IN CASE OF DISCREPANCY OR CONFLICT.

Section 1.5.4, page 17, of "The State Road Commission for West Virginia, Standard Specifications, Roads, and Bridges, Adopted 1952" (blue printed volume) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project,* (as were the directions on the bid proposal and the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrepancy,* figured dimensions shall govern over scaled dimensions. *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Com-

mission. Accordingly, section 1.4.3 of the Standard Road Specifications is also applicable and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The *special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith.*" (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four, single-spaced legal size sheets, describing the work involved in the item, and being the dam construction.

III

EMPLOYMENT CONTRACT OF PETITIONER WETHERALL WITH PETITIONER PRICE

A.

1. By employment contract dated November 29, 1960, between Petitioner Wetherall and Petitioner Price, Petitioner Wetherall undertook to supervise the performance of the actual work on said project according to the terms contained therein for ninety per cent (90%) of the unit bid prices less the cost and expenses thereof; and that *Petitioner Wetherall was to be paid for the same quantities of work for which Petitioner Price was to receive payment from the Road Commission.*

2. Petitioner Wetherall did thereafter supervise the performance of such work to its completion, including the dam work under the item designated as Borrow Pit Excavation and being the dam construction of selected borrow material obtained from roadway excavation; and he has a subsisting and beneficial property right and interest in

such work and in the payment therefore by respondents to Petitioner Price.

IV

PERFORMANCE OF WORK

A.

1. In accordance with the contract, Petitioner Price, and Petitioner Wetherall as job supervisor under the terms of the agreement aforesaid, did select from the material from roadway excavation as directed by the proposal, drawings and plans, and Technical Specifications, and segregate therefrom, 41,695.5 cubic yards thereof designated as Borrow Pit Excavation, as measured in place by Respondents. And Petitioners did haul, place and compact such material in the dam on the adjoining recreational area property of the Conservation Commission, and perform all of the other operations of work necessary and incidental to the construction of the dam embankment as set forth in detail in the "Technical Specifications, Castleman Run Lake No. 1" which are part of the Special Provisions. Said project and all of the work included therein, has been approved and accepted by the Road Commission, and the dam approved and accepted by the Conservation Commission.

2. During the progress of the work, including the construction of the dam under the item of Borrow Pit Excavation, the Road Commission calculated by monthly estimates the estimated quantities thereof and the amount due therefor at the unit prices and the Road Commissioner issued his periodic requisitions therefor upon the State Auditor for payment to Petitioner Price of the amount thereof, including that under the item of Borrow Pit Excavation, due upon each monthly estimate.

3. That upon the completion and acceptance of said work, the Road Commission calculated the final and total estimate of quantities thereof and the amount due therefor, and certified for payment said 41,695.5 cubic yards of Borrow Pit

Excavation; that subsequently in August, 1963, the Road Commission before payment on such final estimate, arbitrarily and capriciously revised said estimate and totally eliminated the payment for the work in constructing the dam which was comprehended under the item of Borrow Pit Excavation, measured as 41,695.5 cubic yards thereof, and back charged the amounts previously paid for the construction of the dam embankment to amounts acknowledgedly due upon construction of the roadway; and that the Road Commissioner has refused to issue his requisition for payment of the dam construction work represented by 41,695.5 cubic yards of Borrow Pit Excavation.

V

PAYMENT FOR DAM WORK BY CONSERVATION COMMISSION

A.

1. Pursuant to the statutory agreement, the total cost of the construction of the dam and causeway was to be borne by the Conservation Commission, and for which the Legislature appropriated to the Conservation Commission the funds to pay therefor. The total cost, according to the Respondent's own figures (including the $20,847.75 representing the dam construction under the item Borrow Pit Excavation) was $48,134.01.

2. On June 7, 1962, the Road Commission invoiced the Conservation Commission (now Department of Natural Resources) for "Castlemen Run in Brooke in Ohio County $38,990.00" and on June 14, 1962 invoiced it for "Balance due on Castlemen Run Dam, $12,710.00" and "Right-of-Way Costs, $500.00". By Warrant No. 148,828 dated June 15, 1962 and Warrant No. 157,277 dated June 19, 1962, the Conservation Commission paid the Road Commission respectively $38,990.00 and $13,210, which (less right-of-way costs of $500 included therein) represented payment of

$51,700 as reimbursement to the Road Commission for building the dam and causeway.

3. By the revised final estimate of the Road Commission, the Road Commission now represents that the total cost of the dam and causeway was only $27,286.26. Petitioners say that under the statute said $51,700 charged the Conservation Commission was deposited to the State Road Fund. Petitioners believe that of the $24,413.74 difference between said figures, the sum of $20,847.75 thereof, represents reimbursement claimed by the Road Commission from the Conservation Commission for the dam construction under the item of Borrow Pit Excavation, and paid to the Road Commission by the Conservation Commission, and which the Road Commission now refuses to pay the Petitioners.

VI

RESPONDENTS REFUSE PAYMENT AND APPROPRIATE PETITIONER'S PROPERTY

A.

1. Respondents refuse to pay for the dam construction under the item of Borrow Pit Excavation for the alleged reason Section 2.3.1 of the "Standard Specifications Roads and Bridges" allegedly prohibits payment under the item "Borrow Excavation" coming from roadway excavation, notwithstanding to the contrary, and express directions and provisions of the bid instructions, bid proposal and special provisions, all of which governed and took precedence over the Standard Specifications by an express provision of the Standard Specifications themselves.

2. Petitioner Price further says that he has a right of property in the contract aforesaid and Petitioners Price and Wetherall further say they have a right of property in said contract's completion and a right of property in all of the work, labor, services and materials performed under the item Borrow Pit Excavation and incorporated in the

public dam, and that the same is of the value of $20,847.75, and that Respondents, NOTWITHSTANDING the fact the Road Commission has collected from the Conservation the money for the payment of such property and their duties not to deprive Petitioners of their property without due process and not to take such property for public use without just compensation as guaranteed by the Federal Constitutional provisions aforementioned, did wrongfully abrogate the terms of said contract and deprive Petitioner Price of his property right therein, and did wrongfully appropriate Petitioners Price and Wetherall's work, labor, services and materials incorporated in the public dam and deprive Petitioners of their property therein of the value aforesaid without due process and did take same for public use without just compensation in violation of the Federal Constitution provisions aforementioned; and NOTWITHSTANDING Respondents' further duty, in the premises of the duties aforesaid, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property appropriated by them for public use, Respondents, although requested so to do, have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioners and pay them just compensation therefor.

PRAYER

WHEREFORE, Your Petitioners therefore pray that a writ of mandamus be issued, directed to the Road Commission of the State of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, commanding them to forthwith institute in the Circuit Court of Brooke County, West Virginia, a proceeding to acquire from Petitioners under the authority of eminent domain, the following property belonging to Petitioners:

1. Petitioner Price's rights in the contract aforementioned;

2. Petitioners Price and Wetherall's work, labor, services and material incorporated in the public dam aforesaid in Brooke County, West Virginia, and appropriated by Respondents for public use and being comprehended under and described as 41,695.5 cubic yards of Item 3, "Borrow Pit Excavation" under the terms of the contract aforesaid;

and to that end a rule may be issued against them commanding them to appear before this Court on the 15th day of January, 1966, and show cause, if they or either of them can, why they should not do so; and grant unto your Petitioners such other and further relief as the Court may deem proper and as the law may require, and as in duty bound your Petitioners will ever pray, etc.

And for such other and further relief so aforesaid, Petitioners pray in the alternative, that in the event the remedy of mandamus to compel Respondents to institute proceedings in eminent domain as represented by the Attorney General of the State to the United States Supreme Court as being a proper and available remedy, be deemed improper and unavailable by the Court, that the petition herein be taken and treated as a proceeding for declaratory judgment under Article 13, Chapter 55 of the Code of West Virginia, 1931, as amended, and Rule 57 of the Rules of Civil Procedure, and that the Court will:

1. Declare the rights of the Petitioners under and in said contract;

2. Declare the right of Petitioners to have the Road Commissioner certify the performance of the work, services, labor and material in constructing the dam under the item of Borrow Pit Excavation, the quantity thereof as 41,695.5 cubic yards, the price and value thereof as $20,847.75, and issue a requisition for the payment thereof upon the State Auditor,

and for further and coercive relief:

1. That the Road Commissioner be compelled to perform his duty to certify the performance of the work, serv-

ices, labor and material in constructing the dam under the item of Borrow Pit Excavation, and the quantity thereof as 41,695.5 cubic yards, the price and value thereof as $20,847.75 and be compelled to issue the requisition of the Road Commission to the State Auditor for $20,847.75 as payment thereof at the contract price of 50 cents per cubic yard, out of the State Road Fund to which was deposited the reimbursement therefor received from the Conservation Commission; and

2. For such other and further relief, both general and special, as to the Court may seem appropriate in the premises of this alternative prayer.

R. C. WETHERALL, JR.,
PAUL PRICE,
Petitioners,
By Counsel

CARNEY M. LAYNE
638 Fifth Avenue,
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia
Counsel for Petitioners

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to-wit:

R. C. Wetherall, Jr., one of the Petitioners named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be on information he believes them to be true.

R. C. WETHERALL, JR.
Petitioner

Taken, sworn to and subscribed before me this 20th day of December, 1965.

My Commission expires March 19, 1969.

L. J. MEISEL
Notary Public

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to-wit:

Paul Price, one of the Petitioners named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be on information, he believes them to be true.

PAUL PRICE
Petitioner

Taken, sworn to and subscribed before me this 21st day of December, 1965.

My Commission expires 2 Nov. 69.

E. G. MARSHALL
Notary Public

APPENDIX K

Pertinent Provisions of Contract Document Showing Patent Error in Road Commissioner's Interpretation and Which Trial Court Refused to Interpret.

A. Provisions contained in *Special Provisions and Specifications Pertaining to Dam Construction* authorizing payment for dam construction under Item 3, termed Borrow Pit Excavation.

(1) In The Bid Proposal Directions and On The Plans and Drawings:

The Instructions under "note" on the Proposal Form, Schedule of Prices, page 3, and the directions on Sheet 2 of the 7 Sheets of Plans styled "Conservation Commission of West Virginia, Division of Engineering, Castleman Run Lake No. 1, Brooks and Ohio Counties," (both part of Complaint Exhibit A) provides as follows:

> "Dam and causeway are to be constructed of selected *borrow material obtained from the roadway excavation,* core trench excavation, and spillway excavation. This material shall meet the specifications of the Conservation Commission of West Virginia Item 3 and shall be placed in accordance to their specifications. *The cost of selecting and segregating the material, hauling and placing, compacting, and all work necessary in completing the dam and causeway shall be included in the unit cost bid for Item 3 and Item 6.*" (Italics supplied). (Items 3 and 6 and respectively "Borrow Pit Excavation" and "Causeway Embankment Fill"—Ed.)

(2) In The Specifications:

The contract included under the dam and causeway construction an item of work designated Item 3, "Borrow Pit Excavation" (Exhibit A—Proposal, Schedule of Prices, p. 2, Line 10). The dam construction covered by this item and to be paid for by the quantity of material used, is specifically described in section 3.14 of the "Technical Specifications, Castlemen Run Lake No. 1" (p. 6) (part of Com-

plaint Exhibit A and being a "Special Provision") which reads as follows:

"ITEM NO. 3 BORROW PIT EXCAVATION
3.3 EMBANKMENT

The work covered by this item consists of furnishing all labor, materials and equipment and performing all the excavation and other operation in connection with the construction of embankments, as shown on the plans or as directed by the Engineer.
The term "embankment" shall mean the earth fill portion of the dam.

3.14 BASIS OF PAYMENT

Work under this item shall include the furnishing of all labor, plant and materials necessary for the construction of an earthen embankment and outlet channels in accordance with the drawing and specifications, work to include diversion of creek, cofferdams, stripping, excavation from designated borrow areas and embankment site, transportation and placement of material for embankment construction including clay core, disposal of unsuitable material, grading, compaction of fill with proper moisture content, scarification, backfill adjacent to structures in Item 5, together with any other incidentals necessary to this operation and payment will be made at the price bid per cubic yard measured as excavated from the borrow areas."

B. Provision contained in Road Commission's *Standard* Specifications Roads and Bridges pertaining to Borrow.

Section 2.3.1 page 54, of "The State Road Commission of West Virginia, Standard Specifications Roads and Bridges, Adopted 1952" (414 page blue printed volume—part of Complaint Exhibit A) provides as follows:

"BORROW EXCAVATION

2.3.1 DESCRIPTION
This item shall consist of excavating, transporting, place and finishing material *to complete the roadway and embankments; which material is not obtainable*

from any other item of excavation or within the limits of the right-of-way. Borrow Excavation shall be obtained from Borrow Pits as noted on the Plans or otherwise designated by the Engineer, sites for which will be secured and paid for by the Commission." (Italics supplied).

On the supposed basis that the application of this *standard* provision precluded payment for the dam construction under Item 3, Borrow Pit Excavation, the Road Commissioner refused payment, on the ground the material used in the dam came from the right of way excavation, *notwithstanding the proposal, special provisions and plans as heretofore set forth expressly directed it be taken from roadway excavation*, and notwithstanding that by other provisions of the standard specifications hereafter set forth, the proposal, special provisions and plans governed and took precedence over the *standard* specifications.

C. Provision contained in Road Commissions Standard Specifications, Roads and Bridges, giving precedence to proposal, special provisions and plans over standard specification in case of discrepancy or conflict.

Section 1.5.4, page 17, of "The State Road Commission of West Virginia, Standard Specifications, Roads and Bridges, Adopted 1959" (blue printed volume part of Complaint Exhibit A) *designed to give controlling effect to the proposal, plans and any documents which are specially drafted with reference to the particular project*, (as was the "Technical Specifications, Castlemen Run Lake No. 1" for the dam) reads as follows:

"1.5.4 CO-ORDINATION OF SPECIFICATIONS AND PLANS:

These specifications, the Plans, special provisions, and all supplemental documents are essential parts of the contract, and a requirement appearing in one is as binding as though appearing in all.

They are intended to be complementary, to describe and provide for a complete work. *In case of discrep-*

ancy, figured dimensions shall govern over scaled dimensions, *Plans shall govern over Specifications, proposals and special provisions shall govern over both Specifications and Plans.* The Contractor shall not take advantage of errors or omissions in the Plans or of any discrepancy between the Plans and Specifications." (Italics supplied).

The Standard Road Specifications do not cover dam construction, and the dam work was for the Conservation Commission. Accordingly, section 1.4.3 of the Standard Road Specifications is also of applicability and it reads as follows:

"1.4.3 SPECIAL PROVISIONS:

Proposed work or requirements not covered by these specifications will be covered by special provisions. The special provisions shall govern the work as though part of these specifications and shall take precedence whenever in conflict therewith." (Italics supplied).

The "Technical Specifications, Castlemen Run Lake No. 1" (for the dam) describes in detail each of the eight items for dam and causeway construction, and Item 3, "Borrow Pit Excavation," takes up over four single-spaced legal size sheets, describing the work involved in the item. The last section of this item, "3.14 Basis for Payment," previously quoted, states that for the dam construction work "payment will be made at the price bid per cubic yard" of "Borrow Pit Excavation."

Without the application of any rules of construction, the contract is express as to meaning and the Road Commissioner's "interpretation" is violative of the contract as prepared by the Road Commission itself, and patently wrong.